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Nomos and Thanatos (Part B). Feminism as Jurisgenerative Transformation, or Resistance Through Partial Incorporation?

Richard F. Devlin
University of Calgary

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I. *Introduction*

In Part A of this essay, "The Killing Fields"¹, I developed a critique of the disciplinary impulses that underlie modern law and legal theory. Invoking a number of perspectives and a plurality of analyses, I proposed that male-stream legal theory and contemporary law both assume as inevitable, and legitimize as appropriate, the funnelling of violence through law. The problem with a funnel, however, is that it does not curtail or reduce that which is channelled through it. On the contrary, to funnel is to condense and to intensify. Viewed from this perspective, interpreted from the bottom up, law and legal theory are not the antithesis of violence but rather its apotheosis.

Critique, however, can only take us so far, and alternative consciousness is not changed reality. In this second part of the essay, I attempt to cautiously outline a reconstructive sequel that suggests the possibility of making law and jurisprudence "otherwise". Specifically, I filter my reflections and tentative proposals through the critical prism of feminist theory and practice. Moreover, paralleling the pattern of argument in the first part of the essay, I will draw on "knowledges" that have, traditionally, either been alien to, or marginalized by, conventional jurisprudential inquiry. In this way, I hope to provide some critical distance on the theory and practice of modern law (and its hegemonic propensities) thereby enabling us to envision, even if only for a moment, the possible nature of a postmodern, postpatriarchal juridical regime.

In section II of this part of the essay, through an analysis of feminist literary criticism and feminist psychoanalysis, I outline two of the predominant themes that have, historically, pervaded feminist analysis: equalitarianism and gynocentrism. However, rather than seeing these approaches as being in conflict or antithetical, I will argue that, though in tension, they are potentially compatible and even mutually reinforcing. I will concretize this discussion through an affirmative interpretation of the analyses of Carol Gilligan and Catharine MacKinnon.^{1a}

In section III, I relate these more thematic discussions to an overview of feminist responses to pornography, while in section IV, I suggest that the feminist turn to law, as it is currently constituted, while being part of the solution, tends to reinforce part of the thanatical problem. The conclusion attempts, briefly, to identify some of the strengths and

1. (1989), 12 Dalhousie L. J. 298. For acknowledgements and caveats see Part A, footnotes 1 and 12. In particular, I am grateful for the critical commentary of Alexandra Z. Dobrowolsky.

1a. This essay was completed prior to the publication of Carol Gilligan et al., *Mapping The Moral Domain* (1989) and Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989).

weaknesses of the various theses presented in “Nomos and Thanatos, Parts A and B.”

II. *Feminism*

1) *The Significance of Feminism*

“The principal objective of feminist criticism has always been political: it seeks to expose, not to perpetuate, patriarchal practices.”

Toril Moi²

Feminism, I think, is at the cutting edge of progressive social movements within post-industrial society. Feminism, by its very existence, demonstrates the poverty of liberalism’s commitment to equality. It seeks to realize what for liberalism has been, at best, pious platitudes,³ at worst, ideological obfuscation, chicanery and apologetics.⁴ Feminism is progressive in the sense that it recognizes and acts upon the *needs* of women in contemporary society in order to help them achieve substantive equality. It aspires to a full recognition of women’s humanity. Feminism helps.

Feminism can be distinguished from other progressive movements in that it is radically effective. It grows out of, and is underpinned by, the lived experiences of women and continually strives to improve the social, economic and political conditions within which women live. Whereas Marxism has been effectively relegated to the peripheral of the academy (at least in the rich western countries), feminism is a constitutive element of modern political practice. Moreover, social democracy, a stunted hybrid of socialism and liberalism, has proved itself incapable of doing more than making minor modifications to the basic structure of society, even when it can work out what it wants to do.

Critical theory, while perhaps the most progressive social theory, has remained just that, theory. In both its social-philosophical and legal manifestations it is very much the product of celebrated male professors at prestigious universities. For most, it is unintelligible and inaccessible, a sophisticated and convoluted critique with almost no direct or immediate political relevance. Although visionary, it has not yet made its way into the interstices of everyday human interaction. Critical theory, at this time, lacks both the means to communicate and a productive/receptive constituency.

2. *Sexual/Textual Politics* (1986) xiv.

3. John Rawls, *A Theory of Justice* (1971).

4. Ronald Dworkin, “Liberalism” in *Public and Private Morality* 113 (S. Hampshire ed. 1978); *Taking Rights Seriously* (1978); *A Matter of Principle* (1984); *Law’s Empire* (1986).

Feminism has advantages over all the foregoing. First and foremost, it is existentially located and radically contextual. It never forgets its experiential roots, its *raison d'être* and its ultimate purpose: the achievement of self determination, "home-rule",⁵ and substantive equality for women. Second, although it is reflective and theoretical, it is also driven by political necessity and pragmatism. Feminism strives, not without success, to maintain the link between theory and practice. Third, it is in the political ascendancy. From being an outlandish and illegitimate quirk in the nineteenth century, it has gradually infiltrated the ranks of both liberalism and socialism, discovered their limitations, and transcended them, to espouse its own worldview.

That worldview is large. Feminism does not aspire to being just another pluralist constituency. It does not limit its agenda to incremental reformism, although that is one strategy available to feminism. Rather, feminism seeks to be transgressive and transformative. It is transgressive in the sense that its ambition is to go beyond the realm of what has hitherto been considered as the limits of the possible.⁶ Feminism unmasks the repressive tolerance of rationalism — the "man on the Clapham omnibus" — to adumbrate the deep structured inequality, indeed misogyny, of contemporary society.

Significantly, many feminists argue that for this transgressive dynamic to be effective there must also be radical transformation. However, transformation is not to be confused with revolution, with women replacing the proletariat as the vanguard leading us into the millenium. Rather, transformation demands a complete restructuring and dehierarchization of human interaction in order to eradicate the massive imbalance in gender relations. Only in this way can substantive equality be achieved. In turn, this egalitarian dynamic simultaneously invokes and motivates a reconstitution of contemporary value structures so as to de-centre the excessively individualistic ethic which is characteristic of contemporary society and to emphasize a more inter-subjective one. Feminism's long term goal is therefore large: a complete reworking of our interpersonal relations, a reconstruction of the basic structures of society, and an alternative understanding of what we have historically known as "human nature".⁷

5. Christine Boyle, "Home Rule for Women: Power Sharing Between Men and Women" (1983), 7 *Dalhousie L.J.* 790.

6. In this sense feminism shares with modernism the disbelief that conventional wisdom is as constraining as it is facilitative of our human potential. However, as we shall see below, feminism goes beyond modernism by providing tentative suggestions as to what "otherwise" might mean.

7. Marilyn French, *Beyond Power* (1985) ch. 6, "Feminism".

2) *Themes of Feminism*

Feminism is, and always has been, a heterogeneous and polyvocal “movement”, one which has undergone numerous metamorphoses over the period of its existence.⁸ Although this lack of fixity may mean that there is no “one true essential feminism” thereby rendering feminism undefinable, it is a veritable strength in that it allows for diversity, historical contingency, openness, ongoing dialogue and self-criticism. It renders feminism a dynamic and progressive movement.

However, despite this heterogeneity, on my understanding, it is possible to discern, in particular, two pervasive themes⁹ or traditions which have manifested themselves, with various intensities, in the works and programmes of different participants at different times.¹⁰ As I shall suggest, these two themes co-exist in a mutually reinforcing tension¹¹

8. There are many different feminist voices, including, for example, radical feminism: Zillah Eisenstein, *The Radical Future of Liberal Feminism* (1981), Liz Stanley and Sue Wise, *Breaking Out, Feminist Consciousness and Feminist Research* (1983); marxist feminism: Charnie Guettel, *Marxism and Feminism* (1974), Lydia Sargent (ed.) *Women and Revolution* (1981); socialist feminism: Mary O'Brien, *The Politics of Reproduction* (1981); critical legal feminism: Fran Olsen, “The Family and the Market” (1983), 96 Harvard L.Rev. 1497, “The Sex of Law” (unpublished manuscript 1984); psychoanalytic feminism: Carol Gilligan, *In a Different Voice* (1982). [Hereinafter cited as *Voice*]; lesbian feminism: Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence” (1980), 5 Signs 631; black feminism: Bell Hooks, *Feminist Theory: From Margin to Centre* (1984); existentialist feminism: Simone de Beauvoir, *The Second Sex* (1957); liberal feminism: Elizabeth Wolgast, *Equality and the Rights of Women* (1980), Ann Scales, “Towards a Feminist Jurisprudence” (1980-81), 56 Indiana L.J. 375, Wendy Williams, “The Equality Crisis” (1982), 7 Womens’ Rights Law Reporter 175, Susan Okin, *Women in Western Political Thought* (1979), “Justice and Gender”, 16 Philosophy and Public Affairs 42 (1987), Jean Elshtain, *Public Man, Private Woman* (1981), Janet Radcliffe Richards, *The Skeptical Feminist* (1980).

For a useful overview of various feminist perspectives see A. Jagger, “Political Philosophies of Women’s Liberation” in *Feminism and Philosophy* 7 (M. Vetterling-Bruggin, F. Elliston, J. English, eds. 1977).

9. See also Seyla Benhabib and Drucilla Cornell, “Introduction: Feminism as Critique” (1986), 5 Praxis International 365; K. Lahey, “Feminism, Theory and Method” (April 1984), (Unpublished Paper, presented at special conference on Feminist Legal Theory, Osgoode Hall Law School); “Equality and Specificity” (unpublished manuscript).

10. It is important that I point out that my claim is not that these two themes, either conjunctively or in opposition, capture the essence of feminism; they are not necessarily its determining features. There are many other vitally important cross-currents in the matrix of feminism which contribute immensely to the richness and novelty of both its theory and practice. I concentrate on these aspects because they have a direct and immediate impact upon the nature and direction of feminist jurisprudence. See further, Julia Kristeva, “Women’s Time” (1981), 7 Signs 13.

11. I use the term “tension” in preference to the more vogueish “contradiction” because, politically, a tension can be more creative than a potentially polarizing and stultifying

which contributes greatly to the reconstructive nature of feminism. I shall characterize¹² these as the “equality approach” and the “gynocentric approach.”

a) *The Equality Approach*

Historically, equalitarianism has been the dominant organizing principle or concept for feminism. The basic claim of the equality approach is that men and women share a common humanity, that they are fundamentally equal and that there is no justifiable reason to treat one group as different from the other.¹³ Consequently, women are entitled to participate in all aspects of contemporary society. The equalitarian feminist demand is for:

“the full extension of political, civic and juridical equality to women; the rights to public political participation; the realization of social justice in the workplace and other institutions and the legal abolition of sex discrimination such as to allow women to become full economic, civic and political agents.”¹⁴

contradiction which may assume a non-transcendable dichotomy. See also Fran Olsen, “The Family and the Market,” *supra* note 8.

12. James Boyd White, *The Legal Imagination* (1985) draws an important distinction between characterize and caricature. I propose to do the former.

13. For classic statements of this position see Mary Wollstonecroft, *A Vindication of the Rights of Women* (1792); John Stuart Mill and Harriet Taylor Mill “The Subjection of Women” in *Essays on Sex Equality* 125 (A. Rossi ed. 1970); As framed by Elizabeth Cady Stanton et al. in the celebrated Seneca Falls Declaration, feminism considers

these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

For a brief review of aspects of the history of women’s shifting attitudes on difference and equality, see Ellen Dubois in “Feminist Discourse, Moral Values and the Law — A Conversation” (1985), 34 *Buffalo L.Rev.* 11 [hereinafter cited as “Discourse”]; Janet Radcliffe Richards, *The Skeptical Feminist* (1980). E. Lanz and B. Myerhoff even suggest that equality is a reality in many aspects of contemporary American life, *The Feminization of America* (1985). For a useful brief compilation of French women’s claims for equality over the last three centuries, see, *New French Feminisms* 6-7, 28-29 (E. Marks & I. de Courtivron eds. 1980).

14. See Benhabib and Cornell, *supra*, note 9. See also: Yolande Cohen “Thoughts on Women and Power” in G. Finn and A. Miles *Feminism in Canada* (1983), 229, 235. Equalitarianism was basic tenet of both the E.R.A. movement and the supporters of entrenching the equality provisions in the Canadian Charter of Rights and Freedoms, as well as the gender neutralization of the Criminal Code to reclassify “rape” as “sexual assault”. It is also the basic position adopted by the suffragettes, National Organization for Women, and “La Ligue” — now “le Droit des Femmes” in France.

It is important to point out that the quotation in the text is not suggesting what is the essence of “equality”. Rather it is an attempt to capture what, historically, has been the nature, aspirations and significance of most feminist claims to equality. For a useful discussion of competing interpretations/visions of equality see Colleen Sheppard, “Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms” in *Charterwatch* 195 (C. Boyle, A.W. MacKay, E. McBride, J.A. Yogis eds. 1986). Sheppard discusses the important differences between conservative, liberal and post-liberal conceptions of equality.

Equalitarian feminists also suggest that to accept a distinction based on gender or reproductive ability is to either risk¹⁵ or tolerate a hierarchical dualism in which men dominate and women are subordinate. Equalitarians argue that in the male constructed world in which we live, difference equals domination.¹⁶ It risks confining women to be "moral neatness of the female tended hearth".¹⁷ Consequently, some equalitarian feminists reject what might be called "feminine values" as relics of oppression.¹⁸

b) *The Gynocentric Approach*

"Feminine values are the means of our oppression, the only place we are allowed to be; but they are also potentially subversive because they are so contradictory to the established order outside ourselves."

Yolande Cohen¹⁹

The articulation of the gynocentric perspective is of more recent vintage²⁰ in feminism and is still in embryonic form. The basic claim of the gynocentric approach²¹ is that there are important distinctions between

15. See, for example, Wendy Williams' call for an absolute sex neutrality:

If we can't have it both ways, we need to think very carefully which way we chose.

"The Equality Crisis: Some Reflections on Courts, Culture and Feminism" (1982), 7 Women's Rights L.R. 175, 196.

16. Catharine MacKinnon, "On Difference and Dominance" *Feminism Unmodified* (1987) [hereinafter cited as *Feminism Unmodified*]. It is important to point out that I am not necessarily identifying equalitarianism with liberal feminism. Although both John Stuart Mill and Catharine MacKinnon may favour equality over difference it can hardly be said that the latter is a liberal. By the same token, those who favour gynocentrism may also have very different politico-economic visions. Feminism throws a spanner in the works of traditional political pigeon-holing.

17. I.M. Young, "Impartiality and the Civic Public" (1986), 56 *Praxis International* 381, 389.

18. Angela Miles posits that such a rejection can be identified in the works of, *inter alia*, Simone de Beauvoir, *Second Sex*, 23-25 (1953); Shulamith Firestone, *Dialectic of Sex* (1970); Juliet Mitchell, "Women: the longest revolution" (1966), 40 *New Left Rev.* 11, and "Women: the longest revolution" (1967), 41 *New Left Rev.* 81; Betty Friedan, *Feminine Mystique* 55; Ti-Grace Atkinson, *Amazon Odyssey* (1974); Jeffner Allen, "Motherhood: The Annihilation of Women" in *Mothering* 315 (J. Trebilcock ed. 1984).

19. Cohen, *supra* note 14, at 245.

20. Gynocentrism is not a completely new phenomenon in that, historically, there have been several feminist activists and theorists who generally fit this perspective. For discussion see: Michele Riot-Sarcey and Elani Varikas, "Feminist Consciousness in the 19th Century" (1986), 5 *Praxis International* 443; Sklar, "Hull House in the 1890's: A Community of Women Reformers" (1985), 10 *Signs* 658.

21. For the classic collection of articles which incorporate this viewpoint which has influenced my own thoughts significantly see *Feminism in Canada*, *supra*, note 14. Angela Miles describes this project as "Integrative Feminism", *ibid.* at 12. See also her "The Integrative Feminine Principle in North American Feminist Radicalism: Value Basis of a New Feminism" (1981), 4 *Women's Studies International Quarterly* 481 [hereinafter cited as I.F.P.]; "Integrative Feminism" (1984), *Fireweed* [hereinafter cited as I.F.]. Conspicuous by its absence in this

men and women, that although this awareness has historically operated to the disadvantage of women, there is something valuable within this feminine culture that should be identified, preserved, extended and shifted from "margin to centre"²² rather than be surrounded or abandoned in the quest for equality. This approach seeks to affirm and (re)valorize characteristics, activities and values such as contextualism and holism; compassion and responsibility; nurturing and sharing; cooperation and interdependence; relationalism and empathy; intuition and emotion.²³ Its challenge and re-vision is therefore ambitious: it rejects the contemporary traditions of moral, political and legal life and aspires to reconstruct the whole of human interaction on the basis of pro-social, pro-creative, anti-destructive²⁴ and (re)productive²⁵ values. Gynocentrism

interdisciplinary collection is any discussion of law. See, however, K. Lahey, *supra* note 9 and Colleen Sheppard, *supra* note 14, at 216-223.

The sources of gynocentrism and the documentation of women's difference are varied, and often appear as subtexts rather than explicit, fully recognized themes. Mary O'Brien, *Politics of Reproduction* (1981), relates gynocentrism to the birthing process, as does A. Rich, *Of Women Born* (1976). Jean Baker Miller, *Toward a New Psychology of Women* (1976), Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978) and Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements of the Human Malaise* (1976) relate it to psychosocial analysis of human development. Carol Gilligan, *In a Different Voice* (1982) outlines an alternative moral structure for women, which differs from the abstract sense of justice which predominates today. Several political perspectives also incorporate this view: A. Dworkin, *Our Blood* 63-64 (1976); *Capitalist Patriarchy and the Case for Socialist Feminism* (Z. Eisenstein ed. 1979); L. Fritz, *Thinking Like a Woman* (1975); N. Harstock, "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in *Discovering Reality*, 283 (S. Harding and M. Hintikka eds. 1983).

See also, Barbara Burris, "The Fourth World Manifesto" in A. Koedt et al. *Radical Feminism* (1973); B. Ehrenreich and D. English, *For Her Own Good: 150 Years of the Experts Advice to Women* (1978), at 342; Roxanne Dunbar, "Female Revolution as the Basis for Social Revolution" in R. Morgan, *Sisterhood Is Powerful*, 677 (1970); Sheila Rowbotham, *Woman's Consciousness, Man's World* (1973); Dorothy, "Position Paper of a Feminist on the Report of the Royal Commission on the Status of Women in Canada and the National Ad Hoc Committee on the Status of Women" (1971), 2 *New Feminist* 3; Iris Marion Young, "Impartiality and the Civic Public: Some Implications and Feminist Critiques of Moral and Political Theory" (1986), 5 *Praxis International* 381; Judy Chicago, *Through the Flower* (1975). For a brief overview of the literature and practice see Miles "I.F.P." and Fireweed "I.F.", *ibid*.

22. Bell Hooks, *Feminist Theory: From Margin to Centre* (1984).

23. These values frequently are contrasted with "malist" or androcentric values such as individualism and separation, competitiveness and domination, abstraction and rationalism, and egocentrism.

24. Jeri Dawn Wine even goes so far as to suggest that there is a commitment to non-violence. "Gynocentric Values and Feminist Psychology" in *Feminism In Canada*, *supra* note 14, at 67; see also Marilyn French, *Beyond Power*, 445 (1985); and S. Ruddick, "Preservative Love and Military Destruction" in *Mothering*, *supra* note 18, at 231. *see generally*, Cynthia E. Enloe, "Feminists Thinking about War, Militarism and Peace" in *Analyzing Gender* 526 (B. Hess and M. Ferre eds. 1987).

25. O'Brien, "Feminism and Revolution" in *Feminism in Canada*, *supra* note 14, at 252. As sometimes articulated, gynocentrism privileges reproduction over production, a position that is

seeks to change the very nature and terms²⁶ of power relations, "of what it means to be a woman and what it means to be a man".²⁷ By drawing on its reservoir of transformative values, it promises to take us beyond equality as it has been traditionally conceived, "towards a new departure for humanity as a whole".²⁸ It calls for a feminization of humanity and the negation of the negation imposed by the imperialism of "male-stream" conventional wisdom.

Gynocentrism acknowledges that the achievements of equalitarianism have been significant.²⁹ However, it suggests that equalitarianism, on its own, lacks an emancipatory vision, that it constructs feminism as merely another constituency in the pluralist regime.³⁰ Equalitarianism does not make the fundamental challenge to man's definition and structuring of the "prototype human being". Ultimately, its central weakness is that it comes dangerously close to being premised on an "essentially male model of humanity". Moreover, it runs the very real dangers of being yet another patriarchal cul de sac,³¹ or assimilation.

The equalitarians are similarly perturbed by the gynocentric turn in feminist discourse. They are seriously concerned that such an approach is both strategically dangerous and conceptually misconceived. Gynocentrism is perceived as dangerous in that, by seemingly accepting a moral division of labour, it reconfirms traditional stereotypes of the feminine woman, thereby restricting women's horizons and confining them to the

as critical of traditional Marxism as it is of liberalism. See for example Linda Nicholson, "Feminism and Marx: Integrating Kinship with the Economic" (1986), 5 *Praxis International* 368; Mary O'Brien, "Reproducing Marxist Man", In *The Sexism of Social and Political Theory* 107 (L. Clarke & L. Lange eds. 1979); Dorothy Smith, "The Problem of the Main Business" (Address, Dalhousie University, 9th March 1988).

26. Betty Friedan asks "Can women, will women, even try to change the terms?" *The Second Stage* 33 (1981).

27. Geraldine Finn in *Feminism in Canada*, *supra* note 14 at 303.

28. A. Miles, in *Feminism in Canada*, *supra* note 14, at 214. Marcuse, "Marxism and Feminism" (1974), 2 *Women's Studies* 279, 281. But see A. Rich for a more cautious feminist approach:

The urge to leap across feminism to "human liberation" is a tragic and dangerous mistake.

"Toward a Woman Centred University", *Lies, Secrets and Silence* (1979) at 134, 11.

The concern of this paper is not to "leap across" feminism, but to inquire into the potential of feminist reconstruction, and to raise concerns about the pervasiveness of patriarchal hegemony, both substantively and methodologically.

29. For a review of the success of equalitarianism in an area of sex discrimination see Herma Hill Kay, *Text, cases and materials on Sex-Based Discrimination* (2d) (1981). See also W. Chafe, *Women and Equality* (1977).

30. Angela Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality" in *Feminism in Canada*, *supra* note 14, 213 at 214. Yolande Cohen, "Thoughts on Women and Power" in *Feminism in Canada*, *ibid.* 229 at 230. See also Miles, "I.F.", *supra* note 21.

31. Marilyn French, *Beyond Power*, *supra* note 6.

disempowered and deprived³² private sphere. Difference reinforces and colludes in the continued marginalization, subordination and oppression of women.³³ Egalitarian feminists fear that gynocentrism is conceptually misconceived in that it simply assumes that these are women's values, an assumption that smacks of biological reductionism. It is argued, instead, that gender is socially constructed, that these values are not necessarily women's but are rather those which the powerholders in society—men—have allowed or imposed upon women. We cannot know what women's values are because they have been coerced, constrained and inhibited from developing an autonomous culture. Gynocentrism unmasked, is perhaps masculinist ventriloquism, or simply an inversion of an always and already androcentric construction.

The tension between these two themes is deep and pervasive, resulting in very different theories, analyses and recommendations for practice. While the concept of equalitarianism is fairly well known and understood (particularly by lawyers), the concept of gynocentrism will undoubtedly appear foreign to many readers, and probably utopian. To make the concept more accessible, I wish to adumbrate two relatively recent developments which incorporate this perspective. The first will almost certainly be alien to the vast majority of the legal community: the New French Feminism, while the second has circulated more widely: Carol Gilligan's espousal of a "different voice". The purpose of the following discussion will be to suggest that gynocentrism can have an existence relatively autonomous from patriarchal hegemony; that gynocentrism does indicate the possibility of a society and legal system different from that which currently prevails, and that that difference is substantive.

i) *Difference and Literary Criticism*

a) *Trespassers on the Lawns of Patriarchy:*³⁴
The Feminist Hermeneutics of Suspicion

32. Hannah Arendt has drawn this politico-etymological connection, *The Human Condition* (1958).

33. Miles, "Feminism, Equality and Liberation" in (1985), 1 C.J.W.L. 42, 55. But neither are the gynocentrists unaware of the danger. Thus Kristeva posits . . . "What an unbelievable force for subversion in the modern world! And at the same time what playing with fire!", "Women's Time" in *Feminist Theory: A Critique of Ideology*, 48 (N. Keohane, M. Rosaldo, & B. Gelpi eds. 1982). See also I.M. Young, "Humanism, Gynocentrism and Feminist Politics" (1985), 8 Women's Studies International Forum 173, and Sheppard on the dangers and promise of gynocentrism, *supra* note 14 at 220.

34. Carolyn G. Heibrun, Forward to *Poetics of Gender* at viii (Nancy K. Miller ed. 1986).

"It is obvious that the values of women differ very often from the values which have been made by the other sex. Yet it is the masculine values that prevail."

Virginia Woolf³⁵

"... it is not difference in itself that has been dangerous to women and other oppressed groups, but the political uses to which the idea of difference has been put."

Hester Eisenstein and Alice Jardine³⁶

In the last fifteen years or so, various feminist scholars and activists in a variety of disciplines and fora have begun to recognize the importance and transformative potential of "difference". These inquiries have taken place in intellectually diverse "disciplines" such as "psychoanalysis" and "psychology";³⁷ "literature"³⁸ and "linguistics",³⁹ "history",⁴⁰ "anthropology",⁴¹ and "sociology",⁴² "politics"⁴³ and "philosophy"⁴⁴ and,

35. *A Room of One's Own*, 76 (1929).

36. Introduction, *The Future of Difference* xxiii (H. Eisenstein & A. Jardine eds. 1980).

37. Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); Juliet Mitchell, *Psychoanalysis and Feminism* (1974); Dorothea Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements of the Human Malaise* (1976); Nancy Chodorow, "Gender, Relation and Difference in Psychoanalytic Perspective" in *The Future of Difference*, *supra* note 36; Jean Baker Miller, *Toward a New Psychology of Women* (1976); S. Orbach and L. Eichenbaum, *Understanding Women: A Feminist Psychoanalytic Approach* (1983).

38. *Writing and Sexual Difference* (E. Abel ed. 1982); *The New Feminist Criticism: Essays on Women, Literature and Theory* (E. Showalter ed. 1985); *Gynocritics/Gynocritiques: Feminist Approaches to Canadian and Quebec Women Writers* (Barbara Godard ed. 1987).

39. Robin Lakoff, *Language and Woman's Place* (1975); Cheris Kramarae, *Women and Men Speaking* (1981); C. Kramer et al. "Perspectives on Language and Communication" (1978), 3 *Signs* 638; Sally McConnell Ginnet, "Difference and Language: A Linguists Perspective" in *The Future of Difference* 157, *supra* note 36; S. McConnell Ginnet et al. *Women and Language in Literature and Society* (R. Borber & N. Furman eds. 1980); *Language and Sex: Difference and Dominance* (B. Thorne & Nancy Henley eds. 1975); Symposium (1978), 3 *Signs*.

40. Bernice A. Carroll, *Liberating Women's History* (1976); Barbara Ehrenreich and Deidre English, *For Her Own Good* (1978); Gerda Lerner, *The Majority Finds Its Past: Placing Women in History* (1979); Joan Kelly, *Women, History and Theory* (1984); Alison Prentice et al. *Canadian Women: A History* (1988).

41. *Toward an Anthropology of Women* (Rayna Rapp Reiter ed. 1975); *Woman, Culture and Society* (M. Rosaldo and L. Lamphere eds. 1974).

42. *Another Voice: Feminist Perspectives on Social Life and Social Science* (1975).

43. Elizabeth Janeway, *The Powers of the Weak* (1980); Elizabeth Janeway, "Women and the Uses of Power" in *The Future of Difference*, *supra* note 36 at 327; Ruth Messinger, "Women in Power and Politics" in *The Future of Difference*, *supra* note 36 at 318; Alison Jaggar, *Feminist Politics and Human Nature* (1983); N. Hartsock, *Money, Sex and Power: Toward a Feminist Historical Materialism* (1983); Marilyn French, *Beyond Power* (1985); Kathy Ferguson, *The Feminist Case Against Bureaucracy* (1984); Alison McPhail et al. *Women Organizing For Change* (1988).

44. Elizabeth Wolgast, *Equality and the Rights of Women* (1980); *Women and Values: Readings in Recent Feminist Philosophy* (M. Pearsall ed. 1986); *Mothering* (Joyce Trebilcot ed. 1984); Alice Jardine, *Gynesis: Configurations of Women and Modernity* (1985); M.

the masculinist bastion par excellence, "science".⁴⁵ North American legal communities, however, have been somewhat slower to take up these initiatives,⁴⁶ and efforts to discuss legal recognition and espousal of difference immediately conjure up legitimate concerns about the racist, hierarchicalized dichotomy of "separate but equal" as immortalized by *Plessy v. Ferguson*.⁴⁷

Still, I think it is important for lawyers, and particularly crucial for (pro) feminist lawyers, to discuss "difference" as a useful, desirable and possibly even essential politico-legal strategy, in achieving the ultimate goal: real equality and choice for women. To introduce this discussion of law and difference, it may be helpful if we trace the development of similar discourses in another discipline where there has already been substantial progress on such issues.

One of the most prolific and potentially fruitful developments in the last ten years in thinking about law has been the transdisciplinary impulse to relate law and literature. This "interpretative turn"⁴⁸ is of crucial

Belenky, B. Clinchey et al., *Women's Way of Knowing* (1986); *Women and Moral Theory* (E. Kittay, D. Meyers eds. 1987); N. Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984); B. Harrison, *Making the Connections: Essays in Feminist Social Ethics* (1985); Jean Grimshaw, *Feminist Philosophers* (1986); Caroline Whitbeck, "A Different Reality: Feminist Ontology" in *Beyond Domination* (Carol Gould ed. 1984); Gloria Steinham, "If Moral Decay is the Question, is a Feminist Ethic the Answer", *Ms. Magazine*, Sept. 1987, 57. For a particularly powerful French critique of the imbricated patriarchy of philosophy see Michele Le Doeuff, "Women and Philosophy" (1977), 17 *Radical Philosophy* 2.

45. S. Harding, *The Science Question in Feminism* (1986); E. Keller, *Reflections on Gender and Science* (1985); "Special Issue I: Feminism, and Science" (1987), 2 *Hypatia*; "Special Issue II Feminism and Science" (1988), 3 *Hypatia*.

46. But see Colleen Sheppard, *supra* note 14.

47. 163 U.S. 537 (1896). For classic examples of the sexism of the separate spheres ideology at work see, *Bradwell v. Illinois*, 83 U.S. 130, 16 Wall. 141 (1873); *Muller v. Oregon*, 208 U.S., 28 S.Ct. 324 (1908); *Geduldig v. Aiello*, 471 U.S. 484 (1974); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

For Canadian equivalents see, *In re Mabel P. French* (1905), 37 N.B.R. 359 (S.C.); *Edwards v. A.G. for Canada*, [1928] S.C.R. 276; [1930] A.C. 124, [1929] 3 W.W.R. 479, [1930] 1 D.L.R. 98 (P.C.). [The Persons Case]. For further discussion of this case see M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" (Unpublished manuscript, Sept. 1986); *Bliss v. A.G. of Canada*, [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711, 92 D.L.R. (3d) 417.

48. See Brest, "Interpretation and Interest" (1982), 34 *Stan. L. Rev.* 765; Fish, "Fish v. Fiss" (1984), 36 *Stan. L. Rev.* 1325; Fiss, "Objectivity and Interpretation" (1982), 34 *Stan. L. Rev.* 739; "Interpretation Symposium" (1985), 58 *S. Cal. L. Rev.* 1; "Symposium: Law and Literature" (1982), 60 *Tex. L. Rev.* 373; Weisberg, "A Response to Fish and White" (1984), 5 *Miss. C.L. Rev.* 57; White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" (1985), 52 *U. Chi. L. Rev.* 684; see also McIntosh, "Legal Hermeneutics: A Philosophical Critique" (1982), 35 *Okl. L. Rev.* 1; Patterson, "Interpretation in Law — Toward a Reconstruction of the Current Debate" (1984), 29 *Vill. L. Rev.* 671; Phelps & Pitts, "Questioning the Text: The Significance of Phenomenological Hermeneutics for Legal Interpretation" (1985), 29 *St. Louis U.L.J.* 353; Levinson, "On Dworkin, Kennedy, and Ely:

significance for an understanding of law, in that one of its central achievements has been to reject the "received hierarchy of text and reader",⁴⁹ thereby highlighting the *relational* nature of author-text-reader, and inducing the correlative awareness of the unavoidability of the plurality of legal meanings. The interpretative turn therefore challenges, in a fundamental way, the traditional jurisprudential dichotomization of law as either a transcendental subject or reified object. It recognizes law as relational, interpretable, and non-essential.

Unfortunately, as is common with jurisprudential discourse, the openness of this interpretative turn is more apparent than real. Not only are the law and literature debates very much the progeny of an elite and perhaps politically irrelevant academy, they are predominantly a male-centred and male-determined debate. Put differently, despite a vibrant and vital dynamic of feminist literary criticism and theory, gender conscious interpretations have been muted in the legal academy.⁵⁰

In this part of the article I hope to trace a pattern. I wish to briefly discuss aspects of the more traditional feminist analyses of literature which focus most of their efforts on demonstrating the gender bias of most traditionally valued literature. I hope to make explicit the homology between this enterprise and equalitarianism. On this foundation, I wish to proceed to a more recent impulse in feminist literary theory, one which can be usefully identified as a countertradition of "a different voice". In order to partake of the flavour of this impulse it will be helpful if we abandon the parochialism of North American inquiry, to encourage inter-cultural exchange by outlining the work of one particularly vocal grouping of feminist voices, what has become known as the New French Feminisms. This critical discussion will help identify potential sources for that different voice. The final section will attempt to articulate the substance of that voice, thereby leading us towards an "ethic of care", which, I suggest, tentatively leads towards a legal theory and practice that can point towards the transcendence of our current, thanatically determined legal system.

Decoding the Legal Past" (1984), 51 *Partisan Rev.* 248, 262; See Fried, "Sonnet LXV and the 'Black Ink' of the Framers' Intention" (1987), 100 *Harv. L. Rev.* 751; Posner, "Law and Literature" (1986), 72 *Va. L. Rev.* 1351; Christopher Norris, "Law, Reconstruction and the Resistance to Theory" (1988), 15 *Journal of Law and Society* 166.

49. Toril Moi, *Sexual/Textual Politics* 25 (1986).

50. An obvious and urgent question is "Why?". Clearly such a question goes beyond the narrow confines of this paper but I would suggest that the reason is not because feminists do not wish to participate in the interpretative turn, rather it is because the academy — be it literary, legal or even left — views feminism with a siege mentality, as a threat to the cosy comfort of the intellectual old boys club.

The Feminist Equalitarian Critique of Literary Criticism

In 1981, Elaine Showalter posited that it was possible to identify two modes of feminist criticism. The first she identified as "the feminist critique" claiming that,

it is concerned with feminist *as reader*, and it offers feminist readings of texts which consider the images and stereotypes of women in literature, the omissions and misconceptions about women in criticism, and women as signs in semiotic systems.⁵¹

Showalter identified the second mode as "gynocriticism" which emphasizes

the study of women *as writers*, and its subjects are the history, styles, themes, genres and structures of writing by women; the psychodynamics of female creativity, the trajectory of the individual or collective female career and the evolution and laws of a female literary tradition.⁵²

My suggestion is that "the feminist critique" homologizes with equalitarianism, while "gynocriticism" parallels "difference".

It will be helpful if we articulate the basic project of "the feminist critique" in a little more detail. On a general level, feminist critics have identified language as "a", perhaps "the", central cultural phenomenon which constructs our understanding of the world and our mutual interaction. Words are neither essential nor transcendental, they are socially constructed.⁵³ Recognizing its inherently socialized and socializing potential, feminists have posited that language is a major component in the continued existence of sexism and patriarchy.⁵⁴ More specifically, by connecting text with context, feminist critics claim that gender and literature are inextricably intertwined, that gender-related factors are systemic and pervasive in the creation, dissemination and consumption of any literary work. Feminist criticism identifies the sexism of textual politics. Having identified these concerns, feminist critics claim that the impact of this gender encoding upon the reader is large, that it contributes in a significant way to the structuring of a reader's understanding and acceptance of social relations. Language imposes men's meaning upon women.

51. "Feminist Criticism in the Wilderness" (1981), 8 *Critical Inquiry* 179, 182.

52. *Ibid* at 184-185. Invoking the empowering dynamic of naming, Showalter continues, "no English term exists for such a specialized critical discourse and so I have invented the term 'gynocritics'".

53. For similar arguments from a neo-Marxist perspective see *Culture, Media, Language* (Stuart-Hall et al. eds. 1980).

54. Sheila Rowbotham, *Women's Consciousness, Man's World* 32-33 (1973); Dale Spender, *Man Made Language* (1980).

The oppositional activities mobilised by such a critique range from the “obvious” — which had not been so obvious until the critique was made — to the subtle. Feminist critics draw attention to the unjustifiable preponderance of male authors in academic syllabi. They relate this bias to a patriarchal educational system which systematically undervalues and ignores women’s literary contributions because of its deeply entrenched premise that “artistic creativity is a fundamentally male quality”.⁵⁵ By interpreting through a “hermeneutics of suspicion”⁵⁶ feminists unmask and criticize the sexism and misogyny of cultural texts from Petrarch to Shakespeare, from classical mythology to the Bible — both the Old Testament and the New, — from Chaucer to Milton, from fairy tales to pornography, from D.H. Lawrence to Norman Mailer.⁵⁷ They argue that the use of the generic “he” universalizes maleness, reinforces androcentricity as the benchmark of existence, and eradicates women’s undeniable contribution to society. They object strongly to female stereotyping inculcated via “images of women” which are constructed in literature, thereby providing a severely constrained panorama of role models for women.⁵⁸ One aspect of the critical project is consciousness raising, to help the reader become a “resisting reader”,⁵⁹ to be aware of the ideological fallout of uncritically absorbing such texts.⁶⁰ In brief, feminist critics unpack the sexual politics of the aesthetic.

The parallels with equalitarianism in other fields are obvious. The basic criticism is that women have been excluded, perhaps intentionally,⁶¹ and that the enforced silence has been an important aspect in the continuing subordination and inequality of women in society. The critique is levelled against the exclusion with its correlative detrimental impact upon women, but as call for action it articulates little more than a demand for access and inclusion,⁶² a fair kick at the literary-linguistic can. “Feminist theorists seek equality and bolster their demands with

55. S. Gilbert and S. Gubar, *The Madwoman in the Attic* (1979).

56. E. Showalter, “Towards a Feminist Poetics” in *Women Writing and Writing About Women*, 22 (M. Jacobus ed. 1979). Showalter adopts this phrase from Paul Ricoeur, *Freud and Philosophy*, 32-36 (1970).

57. See for example, Kate Millett, *Sexual Politics* (1970); Katherine M. Rogers, *The Troublesome Helpmate* (1986); Elizabeth Meese, *Crossing The Double Cross* 9 (1987).

58. Mary Ellman, “Feminine Stereotypes” in *Thinking About Women* (1968); Susan Kippelman Cornillon, *Images of Women in Fiction* (1972).

59. Judith Fetterley, *The Resisting Reader* (1978).

60. Annette Kolodny, “Dancing Through the Minefield . . .” (1980), 6 *Feminist Studies* 1.

61. “Women writers were not haphazardly ‘forgotten’ but deliberately buried”, Annis Pratt, “The New Feminist Criticism” (1970-71), 32 *College English* 872.

62. Annette Kolodny, “Some notes on defining a feminist literary criticism” (1975-76), 2 *Critical Inquiry* 75.

claims of similarity.”⁶³ This type of feminist criticism and revision is important in that it explodes the liberal myths of cultural pluralism and openness to reveal that our literary-linguistic genealogy has been truly *history* thereby excluding women’s *heritage*.⁶⁴

However, it soon becomes apparent that this negative critique, the unearthing of the archaeology of women’s silence, although necessary and certainly beneficial, is by no means a sufficient foundation for fully articulating women’s contributions — past and present — to literature. The feminist effort to revise the male bias inherent in the evolution of literary merit leaves too much of the methodological, if not the substantive, androcentric structure intact. As Showalter pithily posits:

the feminist obsession with correcting, modifying supplementing, revising, humanizing or even attacking male critical theory keeps us dependent upon it and retards our progress in resolving our own theoretical problems.⁶⁵

Feminist criticism continues to work within the masculinist paradigm, it does not challenge the paradigm itself in any fundamental way. It is partial rather than total criticism of the “economy of sameness”.⁶⁶ The most obvious example of its limitations is that its analyses are primarily concerned with male texts.

In the light of these limitations, Showalter calls for a “feminist criticism that is genuinely women centred, independent and intellectually coherent. It must find its own subject, its own system, its own theory, its own voice . . . we must choose to have the argument out at last on our own premises.”⁶⁷ This she names “gynocriticism” and emphasizes that its fundamental question is “what is *the difference* of women’s writing”?⁶⁸

The most important shift envisioned by this proposal is that the data base be primarily women’s texts, not those of men.⁶⁹ The potentially

63. Elizabeth Abel, Introduction (1981), 8 *Critical Inquiry* 173.

64. For a less than sympathetic male response which seeks to accommodate feminist criticism by reducing it to just another constituency in the cacophany of literary critical voices, see K.K. Ruthven, *Feminist Literary Studies* (1984).

65. Showalter, *supra*, note 51, at 183.

66. Meese, *supra* note 57, at 17.

67. Showalter, *supra* note 51, at 184.

68. *Ibid.*, at 185.

69. Not surprisingly, the primary emphases have been on the texts of white women, first world women, heterosexual women. Little was said at the time about lesbian or black women’s literature or criticism. In recent years *intra* gender differences have begun to be articulated, and not always without pain and mutual criticism. See, e.g., A. Rich, “Compulsory Heterosexuality and Lesbian Existence” (1980), 5 *Signs* 631, *On Lies, Secrets and Silences* (1979); B. Zimmerman, “What has never been: an overview of lesbian feminist literary criticism” (1981), 7 *Feminist Studies* 451; Barbara Smith, *Towards a Black Feminist Criticism* (1980). For more general discussions of the occlusion of different women see: Marilyn Frye, *The Politics of*

radical correlative of this "search for a muted female culture"⁷⁰ is that it provides the opportunity for an autonomous and distinctive feminist critical theory and practice of writing. Moreover, it opens up space for something more than negative critique, in so far as it reveals a sustained and ingenious feminist resilience to what had, at first blush, appeared to be a totalizing masculinist hegemony. The necessary critique clears the way for the reconstruction and affirmation of a tradition "of expressivity outside the dominant discourse" that not only can be recognized and redeemed, but also expanded.

Showalter's call was less an exhortation to commence a new endeavour than an articulation of what had already been interstitially underway in the anglophone feminist literary circles for the preceding several years. Several North American books and articles had been published which, despite important differences, had sought to identify both the existence of an extensive women's literature and the ways in which women's writing had been different.⁷¹ They also began to inquire as to whether gender had been a determining factor in that difference.⁷² However, in general, these anglophone efforts did not identify as their central concern the pivotal question of why women's writing was, and continues to be, different. Their discussions were diverse rather than central, in part because their tradition of North American empiricism left little space for more sustained reflection.

In the last five years or so, it may be possible to detect yet another shift in emphasis, or at least direction, in anglophone feminist literary thought.

Reality: Essays in Feminist Theory (1983); Bell Hooks, *Ain't I a Woman Too: Black Women and Feminism* (1981), *Feminist Theory: from Margin to Center* (1984); Gloria Joseph, "The Incompatible Menage a Trois: Marxism, Feminism and Racism", in *Women and Revolution*, 91-107 (L. Sargent ed. 1981); Audre Lorde, "An Open Letter to Mary Daly", in *This Bridge Called My Back: Writings by Radical Women of Color*, 94-97 (Cherri Moraga and Gloria Anzaldua eds. 1981); Maria C. Lugones and Elizabeth V. Spelman, "Have We Got a Theory for You! Feminist Theory, Cultural Imperialism and the Demand for the Woman's Voice" (1983), 6 *Hypatia Women's Studies International Forum* 6, at 578-81; Elizabeth Spelman, "Theories of Race and Gender: The Erasure of Black Women" (1980-82), 5 *Quest* 4, 36-62. 70. Moi *supra* note 2 at 76.

71. See for example, *The (M)other Tongue: Essays in Feminist Psychoanalytic Interpretation* 22-23 (Shirley Nelson Gardiner et al. eds. 1985).

72. See for example, Patricia Meyer Spacks, *The Female Imagination* (1975); Ellen Moers, *Literary Women* (1976); Elaine Showalter, *A Literature of their Own* (1977); Nina Baym, *Woman's Fiction* (1978); Sandra Gilbert and Susan Gubar, *The Madwoman in the Attic* (1979); Margaret Homans, *Women Writers and Poetic Identity* (1980); Annette Kolodny, "Some Notes on Defining a 'feminist literary criticism'" (1975-76), 2 *Critical Inquiry* 75; Robin Lakoff, *Language and Woman's Place* (1975). For a useful review of some of these important texts see Toril Moi, *supra*, note 2, Ch. 3 and 4. Indeed, as early as 1923 Virginia Woolf had suggested the possibility of such a distinctive mode of writing in her references to "a woman's sentence" in "Romance and the Heart", *Contemporary Writers* 124 (1965).

There now appear to be several serious North American attempts to suggest explanations as to why women might speak and write differently from men, in *The (M)other Tongue*.⁷³ This relocation of emphasis is inspired by the desire to challenge the androcentric literary paradigm, to critique its unidimensionalism and exclusivity, and to give original value to that which has been traditionally devalued by the masculinist gatekeepers of the literary establishment.⁷⁴

However, the main impulse underlying this differential enterprise has not been indigenously anglophone. Rather, it has been inspired by a group of women scholars working, for the most part in France, to articulate, justify and valorize the importance of "difference". Their contribution is both intriguing and politically crucial so it may be useful if we partake of a "French detour" in order to develop a critical awareness of the origins, development and impact of difference.

b) *The Cartographies of Silence*:⁷⁵

i) *New French Feminisms*:⁷⁶ *Difference Developed: The Sources of the Different Voice*

The limits of my language means the limits of my world.⁷⁷

To imagine a language, means to imagine a form of life.⁷⁸

Ludwig Wittgenstein

Like their Anglo-American counterparts, the primary concern of the New French Feminists (N.F.F.) is to inquire into the nature and relations of language, power and gender. They also identify and critique the historical exclusion of women from culturally valued discourse and writing as a central component in the oppression and repression of women by phallographic⁷⁹ societies. Where the N.F.F. come into their own,

73. *The (M)other Tongue*, *supra* note 71. See, also, *Writing and Sexual Difference* (Elizabeth Abel ed. 1982); *The Poetics of Gender* (Nancy K. Miller ed. 1986).

74. See for example Jean Bethke Elshtain, "Feminist Discourse and its Discontents: Language, Power and Meaning" (1981-82), 7 *Signs* 603.

75. A. Rich, *The Dream of a Common Language* (1978).

76. For useful introductions to the New French Feminists, See Elaine Showalter, "Feminist Criticism in the Wilderness" (1981), 8 *Critical Inquiry* 179; Ann Rosalind Jones, "Writing the Body: Toward an Understanding of L'Écriture Féminine" (1981), 7 *Feminist Studies* 247; Elaine Marks, "Women and Literature in France" (1978), 3 *Signs* 832; Carolyn Greenstein Burke, "A Report from Paris: Women's Writing and the Women's Movement" (1977-78), 3 *Signs* 843.

77. Cited in K.K. Ruthven, *Feminist Literary Studies* 59 (1984).

78. *Philosophical Investigations* para. 19, 53 (1958).

79. French feminists frequently refer to the prefix "phal" in order to identify the inherent maleness of so much of contemporary knowledge, social structures, and social activities. This term has also begun to infiltrate jurisprudential discourse, see e.g. Christine Littleton, "Reconstructing Sexual Equality" (1987), 75 *Cal. L.Rev.* 1279.

however, is their adamant insistence that the reason for this systemic silencing and enforced absence has been the masculinist refusal to recognize women's specificity, women's difference. They advocate that the effective vocalization and inscription of such difference would seriously threaten the monologic, phallus-identity fundamental to mankind's domination of others, including women and nature. The N.F.F.'s attempt to challenge this androcentric colonialism by being positive, by tentatively creating, locating, and valorizing alternative, specifically feminist, languages and literature — what they call *parole féminine, l'écriture féminine*.⁸⁰ Thus, the central concern for the N.F.F. is not feminism and equality, but feminism and difference and their mutually constitutive relationship.

The historical origins of the N.F.F. can, roughly, be traced back to the pseudo-revolutionary days of May 1968, and the subsequent realization that the radical men of the New Left were just as patriarchal, sexist and intolerant of gender issues as their bourgeois forefathers and brothers. In response, the *Mouvement de Libération des Femmes* (M.L.F.)⁸¹ sought to develop its own distinct agendas, agendas that were responsive to the concerns and needs of women. Their activities have ranged from consciousness raising groups to intentionally polemical political action, from the creation of alternative discursive fora to the establishment of non-co-optable journals and even an independent publishing house. Their underlying motivation has been to identify and challenge the deep structural sexism of contemporary French culture, what they called "everyday sexism".⁸²

The intellectual genealogies of the N.F.F. are extremely diverse, including biology, linguistics, neo-Freudian and Lacanian psychoanalysis, social constructionism, structuralism, Derridean deconstruction, and neo-Marxism. Predictably, but unfortunately, because of this genealogical prehistory much of the N.F.F. is, at best, unfamiliar and demanding and, at worst, inaccessible to the uninitiated.⁸³ But difficulty, as Colin McCabe

80. It should go without saying that not all French feminists agree with the N.F.F. analysis, assessment, critique and program. Others, including de Beauvoir, have voiced serious concerns about the dangers in espousing difference. See also Monique Wittig, *The Guerillas* (1973) trans. David LeVay. For useful North American introductions to this opposition to N.F.F. See H.V. Wenzel "The Text as Body Politics" (1981), 7 *Feminist Studies* 264; Ann R. Jones, "Writing the Body" (1981), 7 *Feminist Studies* 247.

81. The M.L.F. was not an organization, but rather an amalgam of diverse radical women's groups, including "Politique et psychanalyse" and "Féministes révolutionnaires". For a fuller discussion of the troubled history of the M.L.F. see Toril Moi, "Introduction" *French Feminist Thought* (1987); Claire Duchén, *Feminism in France* (1986).

82. This historical account draws heavily on Marks and de Courtivron, *The New French Feminisms* (1980), Introduction III, and Duchén *supra* note 81.

83. Marks, *supra*, note 76, at 833.

points out, "is an ideological notion . . . (because) within our ascriptions of difficulty lie subterranean and complex evaluations".⁸⁴ Difficulty is integrally connected with unfamiliarity, lack of experience. But these "circumstances of ignorance" are not fixed, essential or fortuitous. They are not very much the outcome of social structures that have been chosen and perpetuated by those with the power to construct and constrain our cultural milieu and experiences. Thus, those who aspire to be progressive should be suspicious about the familiar and the facile and, at least, be open-minded about the unfamiliar and the difficult. More importantly, difficulty is inevitable in that in attempting to achieve what the N.F.F. aspires to — articulating that which has never been articulated — is, of necessity, unfamiliar. It is a new language.

The New French Feminisms have gone beyond a programme of critique, of unmasking sexism and stereotyping — both explicit and implicit — of unpacking the omissions and misconceptions in traditional literature. Although beneficial and necessary, such consciousness-raising strategies are perceived as inadequate by many french feminists. At best, they may push for a reformist equality, an equality that runs the risk of simply smoothing the sharp edges of misogyny, sandpapering the extremities and thereby permitting, indeed perhaps even reinforcing, the continued existence of the basic structures of masculinist hegemony.

Instead, the N.F.F. propose and proceed immediately with their vision: to directly undercut traditional textual conventions through the subversive tactics of appropriating and revising women's texts, styles and themes, and by articulating the traditional muteness of difference. The N.F.F. seek to elucidate the distinctiveness of women's language "in contrast, not relation, to the dominant conventions".⁸⁵ They seek to present a new, alternative, gender-specific vantage point (episteme) independent and subversive of, and different from, the currently prevailing phallogentric paradigm. "... L'écriture féminine . . . reasserts the *value* of the feminine and identifies the theoretical project of feminist criticism as the analysis of difference."⁸⁶ Central to this project of articulating and valorizing difference has been their eulogy and reappropriation of "la jouissance",⁸⁷ women's pleasure, the libidinal

84. Preface, Gayatri Chakravorty Spivak, *In Other Worlds* (1987).

85. Elizabeth Abel, Introduction, "Writing and Sexual Difference" (1981), 8 *Critical Inquiry* 173, 177.

86. Elaine Showalter, *supra* note 51, at 186.

87. "Jouissance" is one of the central terms of French feminist literary discourses. There does not exist a suitable English language equivalent for this experience. Reflecting the importance of the power of naming, this has now become a neologism in certain North American feminist circles. Marks and de Courtivron interpret it as follows:

economy of women. Difference and la jouissance, they suggest, have the power to de-range and de-centre the “reigning phallus”.⁸⁸

Leading names within this gynocritical dynamic include Hélène Cixous,⁸⁹ Julia Kristeva,⁹⁰ and Luce Irigaray,⁹¹ and their texts have been energizing catalysts for a host of others.⁹²

ii) *Hélène Cixous*

Cixous is profoundly skeptical of equalitarianism suggesting that it is a bourgeois feminist effort to gain legitimacy *within* a patriarchal society.

The verb *jouir* (“to enjoy, to experience sexual pleasure”) and the substantive *la jouissance* (“sexual pleasure, bliss, rapture”) occur frequently in the texts of the new French feminisms. . . . This pleasure, when attributed to a woman, is considered to be a different order from the pleasure that is represented within the male libidinal economy often described in terms of the capitalist gain and profit motive. Women’s *jouissance* carries with it the notion of fluidity, diffusion, duration. It is a kind of potlatch in the world of orgasms, a giving, expending, dispensing of pleasure without concern about ends or closure. One can easily see how the same imagery could be used to describe women’s writing.

Supra, note 82 at 36-37.

Marilyn French has adopted this idea, but has anglicized it to render it a “pleasure principle”, a counterparadigm to the patriarchal dynamic towards power and domination, an ethical standard which can provide guidance and encouragement in the project of “feminizing the world”. *Beyond Power supra* note 7, Chs. 6 and 7.

88. Elaine Marks and I. de Courtivron, *supra* note 82 at 36.

89. Helene Cixous, “The Laugh of the Medusa” (1975-76), 1 *Signs* 875; *Portrait de Dora* (1986); *Angst* (1977) (Trans 1985).

90. Julia Kristeva, *Revolution in Poetic Language* (1984) (Margaret Waller trans.); *About Chinese Women* (1977) (Anita Burrows trans.); *Powers of Horror* (1932), (Leon Roudiez trans.); *Polylogue* (1977); *Desire in Language* (Leon Roudiez ed. 1980); *The Kristeva Reader* (Toril Moi ed. 1986).

91. Luce Irigaray, *Speculum: de l'autre femme* (1974) (Gillian C. Gill trans. *Speculum: Of the Other Woman* (1985); *Ce sexe qui n'en est pas un* (1977) (Catherine Porter trans., *This Sex Which is Not One* (1985)); *Amante Marine: De Friedrich Nietzsche* (1980). In this paper I do not discuss the contribution of Luce Irigaray. Drawing on post-Lacanian psychological theory and deconstruction, Irigaray argues that, traditionally, women have been culturally understood as the “other” of man, as lack, deficiency, incomplete and, ultimately, as his inferior. Thus, she argues that women’s oppression/repression is not simply political or economic, rather it is imbricated in our very understanding and knowledge of the world.

Her affirmative practice is to suggest, inchoately, a conception of woman as she might exist beyond masculine representations of her. I say “inchoately” because to identify woman via a male constructed language would be to represent her, but once again only within the discourse of male theory. Irigaray therefore prefers the gaps, the silences, the blanks in order to indicate but not to define. However, when Irigaray does move beyond refusal and invocation of the blank spaces, she also draws on maternal and reproductive metaphors, as well as female sexuality. See for example “When Our Lips Speak Together” (1980), 6 *Signs* 69.

92. See Elaine Marks, *supra*, note 76 at 838-840. It should also be pointed out that each of these women insist that their projects are diverse from the others, that their work is not an integrated vanguard. Indeed, there are, perhaps fundamental, political differences between them.

Her ambition is the transformation of patriarchal society, to reconstruct it upon a more heterogeneous basis, a society underpinned by a feminine multiplicity, a substantively different, matrifocal and alterior society.

The central concern of Cixous' work is the connection between women's writing and women's body.⁹³ By articulating and developing this connection, Cixous attempts, through a metaphorical discourse, to envision a less dichotomized, mutually alienating conjuncture of social relations. Her enterprise is to imagine and evoke both the means and the possible nature of a society liberated from phallogratic domination. In pursuit of this end, she quests for transformed language and literature.

Cixous' work is remarkably evocative, imaginative and suggestive, both in form and substance.⁹⁴ On occasion, she indicates that the actual biological sex of the author is irrelevant, that difference is to be located in the writing itself.⁹⁵ However, her most significant work challenges the masculine tradition of father as creator by locating the source of difference in women's bodies, thereby emphasizing "the voice of milk and blood".⁹⁶ Through euphoric "verbal rhapsody"⁹⁷ she envisions the female body as plenitude, as capable of a plethora of procreative capabilities: gestation, birth, lactation, writing.

She is giving birth, with the strength of a lioness. Of a plant. Of a cosmogony. Of a woman . . . A desire for text! Confusion! What possesses her? A child! Paper! Intoxications. I'm overflowing! My breasts overflow! Milk. Ink. The moment of suckling. And I? I too am hungry. The taste of milk, of ink!⁹⁸

The richness of these maternal metaphors, while themselves pregnant, are also a source of dilemma. Despite her apparent rejection of reductionist biologism and essentialism on a theoretical level, Cixous seemingly buys into these understandings in the course of her own, intentionally inspirational, literary practice, thereby problematically reducing "jouissance" to either women's reproductive opportunity or their sexuality, a pleasure principle equally and exclusively accessible to

93. See for example *La venue à l'écriture* (1977).

94. Form is just as important as substance, and the work of activists like Cixous is pervaded by openness, non-linearity, fluidity, polysemicness, disconnection.

95. See *Moi*, *supra* note 2 at 108. For example, at one point she indicates that Jean Genet's work indicates traits of "feminine". See "Laugh" *supra* note 89 at 855.

96. Sandra Gilbert, "A Tarantella of Theory" Introduction, *The Newly Born Woman*; (1986) (Betsy Wing trans.).

97. Domna N. Stanton, "Difference on Trial" in *The Poetics of Gender*, *supra* note 34 at 169.

98. In *La venue à l'écriture* 37 (1977). For similar invocations of the "white ink of mothers milk" see "Laugh" *supra* note 89. At times, Adrienne Rich also appears to accept that women's difference is related to their biological capabilities. See for example *Of Woman Born* 11, 62 (1977).

all women. Her political strategy for the empowerment of women leads her onto the treacherous ledge of the transcendental, metaphysical “universal woman subject”,⁹⁹ the mythical earth-mother, and perhaps back to the masculinist and/or conservative identification of woman with nature, only now it is “anatomy is textuality”.¹⁰⁰

Moreover, despite, or perhaps because of, her metaphorical¹⁰¹ and “utopian”¹⁰² predilections and her over-emphasis on the maternal location, Cixous never provides her audience with an account of the substance of difference. Indeed, on the contrary, in her celebrated (wo)manifesto “Laugh of the Medusa”, she goes so far as to deny the possibility of defining the feminist practice of writing:

For this practice can never be theorized, enclosed, encoded — which doesn’t mean that it doesn’t exist. But it will always surpass the discourse that regulates the phallogocentric system; it does and will take place in areas other than those subordinated to philosophico-theoretical domination.¹⁰³

Thus, although Cixous goes beyond critique, her affirmative program remains disconcertingly indeterminate, disturbingly essentialist and tantalizingly suggestive, but ultimately underdeveloped to serve as an empowering, transformative strategy. Something more specific, although necessarily corrigible, is required.

iii) *Julia Kristeva*

Julia Kristeva’s work, although in certain ways significantly different from that of Cixous, also manifests some problems. She is explicit in her anti-biologism and anti-essentialism in so far as she argues that femininity is not necessarily related to sex, but is better understood in relation to marginality. Thus, femininity is understood in a relational rather than in an essentialist sense “as that which is marginalized by the patriarchal symbolic order”.¹⁰⁴ Developing her ideas through a fusion of pre-oedipal

99. “Laugh” *supra* note 89 at 878.

100. Showalter, “Wilderness” *supra* note 51, at 187. For a French Canadian example see Jovette Marchessault, *Lesbian Triptych* (1985). The idea of the “Celtic Triptych” in Part A of this article was inspired, in part, by this book.

101. The point about metaphor is important. In “Laugh of the Medusa” *supra* note 89 at 881 she suggests that the invocation of “mother” is metaphorical and symbolic-inspirational, not biologically determined. However, when reading her texts I get the impression of a greater faith in the idea than merely the instrumental utilization of a concept for strategic purposes. For an alternative critique of the maternal metaphor which argues that revalorization through mimeticism remains within sameness, see Domna N. Stanton, “Difference on Trial” in *Poetics of Gender* *supra* note 34 at 170-173.

102. Moi, *supra* note 2 at 121-124.

103. Marks and de Courtivron, *supra* note 82 at 253.

104. Moi, *supra* note 2 at 166.

interpretations of mother-child interaction and semiotic theory,¹⁰⁵ she develops an interpretation that allows her to posit that men can also be “different” in so far as the patriarchal symbolic order considers them as marginal. Thus, she discusses the subversive difference of avant garde artists such as Joyce, Artaud, and Mallarmé. However, she is still very much a proponent of difference:

Woman is here to shake up, to disturb, to deflate masculine values, and not to espouse them. Her role is to maintain differences by pointing to them, by giving them life, by putting them into play against one another.¹⁰⁶

Although Kristeva is keen to “remind us that any hope for a radically new ethics may be up to women”,¹⁰⁷ she refuses to conjecture about the “female subject’s potential liberation from patriarchy”,¹⁰⁸ claiming only that the feminist project is one of critique and negation, subversion and dissidence. This becomes most apparent in her *On Chinese Women* when she opines:

On a deeper level [than advertisements or slogans for women’s demands], however, a woman cannot “be”; it is something which does not even belong in the order of *being*. It follows that a feminist practice can only be negative, at odds with what already exists. . . . In “woman” I see something that cannot be represented, something above and beyond nomenclatures and ideologies.¹⁰⁹

Kristeva also directly confronts the question of ethics. In *Revolution in Poetic Language* she develops her negative vision of political praxis even more explicitly. She claims that radical practice must take the stance that:

wherever a code (mores, social contract) [emerges it] must be shattered in order to give way to the free play of negativity, need, desire, pleasure and jouissance, before being put together again, although temporarily and with full knowledge of what is involved.¹¹⁰

And again she argues that women’s strategy should be to assume:

a *negative* function: reject everything finite, definite, structured, loaded with meaning, in the existing state of society. Such an attitude puts women on the side of the explosion of social codes: with revolutionary movements.¹¹¹

105. *Revolution*, *supra* note 90.

106. *Polylogue*, *supra* note 90 at 498.

107. Alice Jardine, Introduction to “Womans Time” (1981), 7 *Signs* 5, 12.

108. Jardine, “Opaque Texts and Transparent Contexts” in *Poetics of Gender*, *supra* note 34, at 110.

109. *On Chinese Women*, *supra* note 90 at 137.

110. Cited in Jardine, “Opaque Texts and Transparent Contexts” in *Poetics of Gender*, *supra* note 34, 96 at 109.

111. Marks and de Courtivron, *supra* note 82, at 166.

Thus, by continually insisting “that a feminist praxis can only be negative, an opposition to what exists, in order to say that’s not it . . . that’s still not it”¹¹², Kristeva’s is an ethics of subversion, a negative ethics, one that seeks to critique, but one that provides little guidance for reconstruction. Although it would be inappropriate to accuse her of nihilism, as an empowering political strategy, her preference for “eternal dissiden(ce)” is only of limited utility.

iv) *The Significance of the N.F.F.*

There is much to be said for the N.F.F. examination, reappropriation and affirmation of the specificity and difference of female experiences and body. Their inquiry highlights, in a crucial way, both the existence and importance of heterogeneity, and the potential not only for different ways of writing but also different social relations premised upon different value structures. Seen in this light, it must be admitted that their efforts have been successful in so far as they have gone a long way towards speaking “(m)otherwise”, while being imprisoned within a discursive structure not only alien, but actively hostile, to the articulation of that which they want to say.

However, unfortunately, in their attempts to unbury the repressed maternal, some N.F.F.’s come dangerously close to the simultaneously authoritarian and crippling impulses of essentialism,¹¹³ the universal and exclusive, anatomically-based identity and experience of women as women. They suggest, both explicitly and metaphorically, that women’s writing “springs from a secret well of immanent femininity”.¹¹⁴ In so doing, they deny the qualitatively different experiences of different women in favour of some putative metaphysical woman’s essence. Such essentialism is uncomfortably silent about differences of class, race, sexual orientation,¹¹⁵ and physical or psychological ability. Although the same criticism cannot apply to Kristeva, she fails to capitalize on her own critical insights and unfortunately retreats into negation with its potentially paralysing political consequences.

Despite these rather serious difficulties, the N.F.F.’s contribution is important. As Spivak points out, within their inquiry there is “an implicit double program for women . . . *against* sexism, where women unite as a biologically oppressed caste; and *for* feminism, where human beings train

112. *Ibid.* at 137.

113. Spivak, “Feminism and Critical Theory”, *supra*, note 84; Unger, *Politics*, (1987).

114. Jane Gallop, “Writing a letter with Vermeer” in *Poetics of Gender*, *supra*, note 34 at 150.

115. Annie Leclerc, “La lettre d’amour” in *La venue à l’écriture* (1977).

to prepare for a transformation of consciousness"¹¹⁶ and, I would add, the practice of our social relations. This double vision is potentially empowering for it attempts to shift the focus of attention from negation to affirmation, while simultaneously remaining acutely conscious of the masculinist powers and structures that be, with their potential for both repressive imperialism and more subtle forms of delegitimation such as ridiculing feminist utopianism. The double vision is an encouraging attempt to develop the ground between self-defeating reformism and mythical revolution by exploring the transformative potential of language. It encourages the articulation and espousal of difference, but now it is an awareness of difference in all its social, political, historical and cultural contexts; difference as heterogeneity rather than determinative polarities.

Thus, despite serious and politically important differences, the N.F.F. are unambiguous in their belief that difference and otherness are of fundamental significance. At the same time, there has been an unwillingness and inability to provide an explicit content for that otherness. The reason for this is not difficult to locate: Men have monopolized the discourse and the words do not, as yet, exist. To say and write what needs to be said and written can, as yet, only be done through discourses and texts which are an anathema to that otherness. The contradiction is stark. Moreover, even if women could articulate a substance for otherness, they do not control the discursive means of production and reception and therefore to even speak or write runs the risk of co-option and appropriation. The French feminist response has been one of using the silences, the gaps, the margins, the spaces, in the hope that they can, even indirectly, communicate something of the significance of otherness. Although cautiously radical, I think that, on the continuum between negation and reconstruction, such tactics are situated a little too closely to the position of negation.

ii) *Feminist Psychoanalytic Theory and a Different Jurisprudence*

a) *Making it "Otherwise"*

"... women's development delineates a path not only to a less violent life but also to a maturity realized through interdependence of taking care."

Carol Gilligan¹¹⁷

The transdisciplinary interpretive turn and French detour indicate that there is merit in looking beyond the imprisoning confines of traditional

116. Spivak, "French Feminism in an International Frame" *supra*, note 84 at 145 and 150.

117. *In a Different Voice*, 172 (1982) [hereinafter cited as *Voice*].

North American legal discourse. The inquiry demonstrates that our formative contexts — intellectual, disciplinary, national and cultural — while constitutive may also be constraining. As lawyers we tend to understand social relations through a particularistic grid, but others may understand those same social relations through an alternative grid. The expansion of our cognitive juridical horizons so as to encompass how others experience and interpret social interaction can provide us with an opportunity to reflect upon our own deep structural assumptions, to ask new and different questions about the nature of law, and to contemplate alternative visions of law, and perhaps society more generally. To simply dismiss other viewpoints as utopian or naive is to uncritically buy into phallocracy, perhaps even reinforcing that which one hopes to transform. For feminism, knowledge itself is a crucial arena for critique and reconstruction.

We can continue feminism's context dislocating and repositioning approach by returning to North America, but by now focusing on some recent psychological theory as developed by feminist scholar, Carol Gilligan. The virtue of Gilligan's approach is that while it advocates both the existence and desirability of difference, it also attempts, in a tentative way, to articulate what difference might mean, what is substantively different about difference. In other words, it cautiously attempts to identify some of the central components of the notoriously ambiguous and multivalent concept of difference.

Gilligan's reflections on difference grow out of her ability to listen. When many of us listen we interpret what the other is saying in accordance with a plethora of assumptions, apparent truths, preconceptions. Consequently, when the other speaks, their discourse is not understood to have any essential meaning, but rather is encoded so as to "fit" with the interpretive matrix which pre-exists their discourse. If a discourse does not fit this pre-existing structure, it is understood as anomalous or, perhaps more accurately, as deviant, inferior, even senseless. Thus, the determining structure of discourse is simultaneously communication-enhancing and communication-exclusive, it is both facilitative and intolerant.

The starting point for Gilligan's work has been her ability to temporarily and partially suspend her socially constructed commitment to the conventional matrix of communicative assumptions and thereby to pick up on the "moral language which spontaneously appeared in women's narratives".¹¹⁸ Her suggestion is that the moral discourse of

118. I. Marcus and P. Spielgelman, "Feminist Discourse, Moral Values and the Law — A Conversation" (1985), 34 Buffalo L.Rev. 11 at 37 [hereinafter cited as Discourse].

women is “bilingual”. More ambitiously, she has begun to develop a countervailing interpretive matrix which allows for the recognition of alternative discourses, those which were formerly understood to be anomalous, deviant and inferior. Every decoding is itself an encoding, and Gilligan identifies the different voice as the feminine voice.¹¹⁹ This alternative matrix not only allows for recognition of that which had been traditionally excluded, but also validates, legitimates and affirms the integrity of that which it identifies.¹²⁰ It valorizes that which has been devalued, and reconstructs our understanding of “difference” to accept it as positive not negative, and perhaps even to encourage us to embrace it.

Gilligan’s insights stem from her studies of the discourse of women who are confronted with moral choices which necessitate an evaluation of the relationship between self and other. Her basic claim is that the hierarchicalized stages of moral development created by Kohlberg et al.¹²¹ are unjustifiably partisan in that they value certain types of moral decision-making over others, without seriously considering the merits of the alternatives. What is particularly problematic for Gilligan is that the other mode of moral decision-making, *prima facie*, appears to correlate more closely with the way women make moral choices. Rephrased, according to Kohlbergian assumptions and criteria of evaluation, women’s moral decision-making patterns are less advanced — read inferior — than those of men.¹²² Moreover, the disconnection between that which is publicly valued and that which better encapsulates the different moral worldview of some women, causes those women a significant degree of personal anguish and pain.¹²³ One important politico-cognitive consequence of Gilligan’s work is that what had seemed to be scientifically neutral and objective, a structure of moral development, can now be understood to be premised upon, determined by and permeated through and through, with an androcentric bias. Gilligan’s enterprise is an important feminist challenge to the fathers of

119. *Voice*, 105. More recently, Gilligan has pointed out that “I deliberately called it a different voice, I did not call it a woman’s voice.” A few lines later she says that her project was not to compare women with men, but to “compare women with theory”. “Discourse” at 38. This is important in that the analysis is not on the basis of sex, but on the basis of the evaluative and cognitive structures that underpin and channel our interaction.

120. *Voice*, at 3.

121. Kohlberg et al., *Essays in Moral Development: Vol. 1: The Philosophy of Moral Development: Moral Stages and the Ideal of Justice* (1981); *Vol. 2: The Psychology of Moral Development: The Nature of Validity of Moral Stages* (1986).

122. Similar processes of marginalization and devaluation of women permeate Freud’s work. See for example his claim that women are “a dark continent for psychology”. “The Question of Lay Analysis”, Vol. XX *Complete Psychological Works of Sigmund Freud* 216 (Strachey ed. 1961).

123. *Voice*, at 71.

psychological, scientific orthodoxy, from Freud to Piaget, from Erikson to Kohlberg.

Gilligan's work, however, is more than simply a psychological version of the egalitarian critique of masculinist hegemony and sexism. She aspires to do more than simply demand that women be allowed to reach the same levels of moral development than men, because, once again, that would leave too much of the methodological and substantive structure of androcentricity in place. Her affirmative vision is that a consciousness of the different structure of moral decision-making should transform the very structures themselves. The different voice seeks to participate equally in defining and evaluating the process of moral development analysis itself. To do this she attempts to capture the substantive dissimilarities of these divergent — although not necessarily incompatible — structures of moral decision-making through the metaphors of "ladder" and "web".¹²⁴

Gilligan posits that the dominant moral ideology and discourse is primarily hierarchical, ladder-like. It is premised upon a conception of the self as individuated, separate, autonomous, independent and essentially the same as other "selves". As a correlative of this conception of the self, community relationships, though real and essential, are considered primarily contractual, competitive and adversarial. These assumptions, in turn, privilege certain forms of decision-making — both personal and structural — rather than others. They favour abstraction, depersonalization and categorization, logic and rationality. They inscribe a legal system with the attribute of determining rules in order to facilitate equality, reciprocity, impartiality, fairness and rights. Finally, the ladder reflects and concentrates within itself an assumption of mutual aggression and a potential for violence.

Although dominant, the ladder is not all encompassing, it is modified, and circumscribed by the web. The web is premised upon a conception of the self as attached, interdependent, connected to other persons, and primarily relational. Consequently, community is experienced as a network or narrative of constitutive, co-operative and mutually vulnerable relationships. These assumptions also privilege certain forms of decision-making, rather than others. They favour contextual judgment, empathy, intimacy and sensitivity to the needs of both self and others. They imbricate the legal system with flexible principles in order to

124. To be slightly more accurate, although Gilligan does explicitly use the metaphor of "the web", I cannot locate "ladder" in her writings. However she frequently counterposes "hierarchy" with "web" but I find this less balanced and coherent than "ladder". Ladder is also the gloss which many commentators have superimposed upon her propositions.

facilitate responsiveness, generosity, nurturance and concern. Finally, the web encompasses a sense of intimacy, a resistance to hurting others, and sponsors an ethic of care.

It is crucially important to remember that Gilligan distances herself from biological determinism. At the very beginning of her book she categorically asserts,

The different voice I describe is characterized not by gender but by theme. Its association with women is an empirical observation and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex.¹²⁵

Thus, despite the occasional identification of difference with "feminine",¹²⁶ difference is thematic and moral, not sociobiological, gender reductionist nor sex exclusive. Gilligan's project, in part, is to "yield a more encompassing view of the lives of both sexes",¹²⁷ and to challenge the "distortions"¹²⁸ perpetrated by our current atomistic worldview.¹²⁹

Moreover, late in her book, Gilligan indicates that there already exists the experience of, and thereby the potential for, the expansion of difference in men's lives. She suggests that the intimacy which men sometimes experience in their post-adolescent years is the

critical . . . transformative experience for men through which adolescent identity turns into the generativity of adult love and work . . . the adult ethic of taking care.¹³⁰

And, a few pages later, she posits that both women and men tend to incorporate elements from each of the different moral approaches in their decision-making processes, although she suggests that this is not necessarily in equivalent proportions.¹³¹ Thus, difference is a question of degree, not of kind. Gilligan cannot be accused of the biological reductionism of "sex is destiny".¹³²

125. *Voice*, at 2; see also *Discourse* at 38.

126. See e.g., *Voice* at 105.

127. *Voice*, at 4.

128. *Discourse*, at 39.

129. Moreover, she also points out the methodological and empirical limitations of her research and that,

"such constraints preclude the possibility of generalization and leave to further research the task of sorting out the different variables of culture, time, occasion and gender,"

Voice at 126.

130. *Voice*, at 163-164.

131. *Voice*, at 166-167.

132. See also *Discourse*, at 47-49.

These are vitally important points. Her advocacy for difference is not based on an essentialist, reductionist vision of male/female nature, absolute, incorrigible, transcendental, reified. Rather, difference needs to be understood within a broader social context, as culturally¹³³ and psychologically¹³⁴ constructed rather than natural, as a deeply entrenched ideology, but an ideology nonetheless.¹³⁵ The recognition of difference as ideology — as a pervasive ideology — is itself therapeutic in that it indicates not only difference's constructedness but also its contingency,¹³⁶ mutability, plasticity and vulnerability to assessment and valorization. Moreover, it opens up the potential to ask: valued by whom and for what reasons? Difference, then, is artifactual, and relational. It does not inhere in essence of the person, it is not dependent upon maleness or femaleness. Rather, it is dependent upon the structure of social relations, it is a process. As such, since it has been made, it can also be re-made. Difference, when modernized, allows us to ask fundamental questions of human agency, questions of responsibility, questions of possibility.

The consequences of choosing one moral position over the other can be of fundamental importance. If one adopts a different version of moral development from that which currently prevails,

the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract. This conception of morality as concerned with the activity of care centres moral development around the understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules.¹³⁷

Thus, for Gilligan, there do in fact exist, at least, two moralities, the "morality of rights" and the "morality of responsibility", because the

133. C. Gould, "The Woman Question: The Philosophy of Literature and the Literature of Philosophy" in *Women and Philosophy* (C. Gould and M. Wartofsky eds. 1976); L. Finley, "Choice and Freedom: Illusive Issues in the Search for Gender Justice" (1987), 96 Yale L.J. 914, 932-933; R.W. Connell, *Gender and Power*, (1987).

134. See also Discourse, at 58. At times Gilligan indicates that she has some sympathy for Chodorow's proposition that identifies the socio-cultural conditions of early childcare as being important for personal gendered development.

135. N. Chodorow, "Gender Relation and Difference in Psychoanalytic Perspective" in *Future of Difference*, *supra* note 36, at 16. See also Alice Jardine, *Prelude to The Future of Difference* at xxv (1980), Monique Wittig, "Paradigm" in *Homosexualities and French Literature* 115 (G. Stambolian & E. Marks eds. 1974); Collette Guillaumin, "The Practice and Power of Belief in Nature: Part I The Appropriation of Women" (1981), 1 Feminist Issues 3-28; "Part II The Naturalist Discourse" *Ibid.* 87-109; Minow, "Justice Engendered" (1987), 101 Harvard L.B. 10 at 31.

136. M. Mead, *Male and Female* (1950); Talcott Parsons, *Family Socialization and Interaction Process* (1956); Simone de Beauvoir, *The Second Sex* (1972), all agree on this point despite their significant differences. See also R.W. Connell, *Gender and Power*, (1987).

137. *Voice* at 19.

former differs from the latter in its “emphasis on separation rather than connection, in its consideration of the individual rather than the relationship as primary...”¹³⁸ On a normative level, one can be understood as an “ethic of care”,¹³⁹ and the other as an ethic of “indifference”,¹⁴⁰ “the logic of justice”.¹⁴¹ Indeed, these different moral visions of rights and responsibilities condense within themselves implicit understanding of our nature as social beings, as “a self defined through separation” and “a self delineated through connection”¹⁴² and where our priorities lie. Moreover, prioritization of one rather than the other has an impact not only on the results achieved, but also on the very “formulation of the problem”¹⁴³ and on the means chosen for its resolution. Preconceptions, comprehension, methodology, results and long term consequences are interconnected in fundamental ways which reflect and structure the social order in which we co-exist.

b) *Transcending bipolarism*

“... this problem of dealing with difference without constituting an opposition may just be what feminism is all about.”

Jane Gallop¹⁴⁴

Although much of Gilligan’s analysis is structured by the counterposing of the web and the ladder, the distinctive moralities of “rights” and “responsibilities”, her ambition is not to replace one exclusionary paradigm with another. Rather her aim is at once more modest and more ambitious, it is integrative rather than supremacist. She calls for a radical expansion,¹⁴⁵ and hence transformation¹⁴⁶ of conventional moral

138. *Voice* at 19.

139. Later she identifies “the ideal of care as an activity of relationship, of seeing and responding to need, taking care of the world by sustaining the web of connection, so that no-one is left alone” *Voice* at 62.

140. *Voice* at 22.

141. *Voice* at 30.

142. *Voice* at 35.

143. *Voice* at 32.

144. Jane Gallop, *The Daughters Seduction* 93 (1982).

145. *Voice* at 105 and 173.

146. *Voice* at 25. Similar distinctions between transformation and revolution can be located in the work of Adrienne Rich. For example in *Lies, Secrets and Silences* (1979) in discussing poetry, Rich opines,

“... As long as our language is inadequate, our vision remains formless, our thinking and feeling are still running in old cycles, our process may be “revolutionary” but not transformative ... When we speak of *transformation* [instead of revolution] we speak more accurately out of the vision of a process which will leave neither surfaces nor depths unchanged, which enters society at the most essential level of the subjugation of women and nature by men. We begin to conceive a planet on which both women and nature might coexist as the She Who we encounter in Judy Grahn’s poems. Poetry is,

development theory with its predilection for equating maturity with separation, not its junking. Her strategy is deviationist¹⁴⁷ and heterogeneous, not revolutionary. Her vision is holistic rather than partial, seeking a fusion of “identity and intimacy”.¹⁴⁸

As an example of her suggestion for the transformative potential of fusion, she provides the example of two children, a girl and a boy, wanting to play different games. The girl wanted to play next-door-neighbours, the boy wanted to play pirates. The resolution of the disagreement was not the mere addition of the two games, or the fair solution of taking turns, but an inclusive or “synergistic” solution,¹⁴⁹ “the pirate who lives next door”. In this scenario, Gilligan argues, a *new* game develops; different from what either of the children imagined separately.¹⁵⁰ She proposes that the articulation of the different voice allows *us* to identify elements of our moral characters that had been previously understood as inferior. Nor, at this point, does she distinguish between gender, both are encouraged to recognize the “other” in themselves.¹⁵¹ What Gilligan is taking us towards is an emphasis on the substantive difference of difference, without exaggerating the differences between us as people.¹⁵²

among other things, a criticism of language . . . Poetry is above all a concentration of the *power* of language, which is the power of our ultimate relationship to everything in the universe. It is as if forces we can lay claim to in no other way, become present to us in sensuous form.”

Catharine MacKinnon, at least on occasion, prefers revolution. “Feminism, Marxism, Method and the State: An Agenda for Theory” (1987), 7 *Signs* 515 at 564 [hereinafter cited as *Agenda*].

147. For a discussion of deviationist strategy in the service of legal doctrinal praxis, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986).

148. *Voice* at 159.

149. *Discourse*, Carrie Menkel Meadow at 54.

150. *Discourse* at 45. There are strong parallels here with Miles’ “integrative” proposals; see *supra* note 21, and *infra* at 56-57.

151. Gilligan emphasizes that the transformation that she aspires to is not androgyny. (*Discourse* at 45 and 84.) The problem with androgyny, it seems, is that it does not challenge patriarchy adequately; it aspires to conjunction, not transformation. S.L. Ben, “The Measurement of Psychological Androgyny” (1976), 42 *J. Consult. Clin. Psych.* 155; Herbert Marcuse, “Marxism and Feminism” (1974), 2 *Women’s Studies* 279 at 287, and Olsen, *supra* note 8 advocate androgyny.

152. See also Joan Tronto, “Beyond Gender Difference To a Theory of Care” (1987), 12 *Signs* 644. The following capture Gilligan’s sense of the nature of post-conventional morality:

The reinterpretation of women’s experience in terms of their own imagery of relationships thus clarifies that experience and also provides a nonhierarchical vision of human connection. Since relationships, when cast in the image of hierarchy, appear inherently unstable and morally problematic, their transposition into the image of web changes an order of inequality into the structure of interconnection. But the power of the images of hierarchy and web, their evocation of feelings and their recurrence in thought, signifies the embeddedness of both of these images in the cycle of human life.

iii) *The Ethic of Care*

Can the decision "to experiment with love ... be reconciled with the decision to fight for equal power?"

V. Held¹⁵³

Even more significant than her espousal of difference are Gilligan's suggestions as to what she understands to be the correlative of the consciousness of difference: the ethic of care. "Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility and the origins of aggression in the failure of connection."¹⁵⁴

Gilligan's discussion of the ethic of care is not developed in any autonomous or comprehensive sense. Rather, it surfaces in her work as a corrective or complement to "the logic of justice", "the premise of equality", as a resisting countermorality to the morality of rights. However, I think it is possible to distill from her reflections some of its interlocking components. Its central insight is an awareness of the constitutive interconnection and interdependence of the self and other. This consciousness of mutuality militates against isolation and separatism, the "pact of withdrawn self"¹⁵⁵ with its correlative potential for selfishness, aggression and violence. The ethic of care encourages a recognition of, and enthusiasm for, the needs of others and a willingness

The experiences of inequality and interconnection, inherent in the relation of parent and child, then give rise to the ethics of justice and care, the ideals of human relationship — the vision that self and other will be treated as of equal worth, that despite differences in power, things will be fair; the vision that everyone will be responded to and included, that no one will be left alone or hurt. These disparate visions in their tension reflect the paradoxical truths of human experience — that we know ourselves as separate only insofar as we live in connection with others, and that we experience relationship only insofar as we differentiate other from self,

Voice at 62-63.

Development for both sexes would therefore seem to entail an integration of rights and responsibilities through the discovery of the complementarity of these disparate views. For women, the integration of rights and responsibilities takes place through an understanding of the psychological logic of relationships. This understanding tempers the self-destructive potential of a self-critical morality by asserting the need of all persons for care. For men, recognition through experience of the need for more active responsibility in taking care corrects the potential indifference of a morality of noninterference and turns attention from the logic to the consequences of choice ... In the development of a postconventional ethical understanding, women come to see the violence inherent in inequality, while men come to see the limitations of a conception of justice blinded to the differences in human life,

Voice at 100.

153. In "Marx, Sex and the Transformation of Society" in C. Gould, M. Wartofsky *Women and Philosophy* (1976), 168, 180.

154. *Voice*, 173.

155. I take this phrase from Peter Gabel, "The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves" (1984), 62 *Texas L.Rev.* 1563.

to respond compassionately and responsibly to those needs,¹⁵⁶ to participate in the lived experiences and reality of others.¹⁵⁷ It identifies “a world of mutuality” that “creates and sustains the human community”.¹⁵⁸ It reconceptualizes and reconstructs moral dilemmas to be issues of competing responsibilities of the self because of its connection with and responsibility for others, rather than a conflict between self and other in which the only options are assertion of the self’s trumping rights, or martyred self-sacrifice on the pyre of altruism.¹⁵⁹ Moreover, it proposes that moral decisions be made on the basis of specific, contextual and particular¹⁶⁰ problems and not *a priori*, hypothetical abstractions. Finally, and of particular importance for this essay, not only does it encourage a discourse and praxis that rejects domination, it strives to resolve moral dilemmas without recourse to violence as that would counteract “the injunction not to hurt others”.¹⁶¹ In so far as the ethic of care is premised upon “nonviolence”¹⁶² it aspires to “a more generative view of human life”,¹⁶³ and even more ambitiously, an affirmative transformation of the polity.

It is important to point out, though, that the ethic of care is distinct from the traditional masculinist stereotype of “female self-abnegation and moral self-sacrifice”,¹⁶⁴ that Virginia Woolf has described as “The Angel

156. *Voice* at 62 at 74-98.

157. *Voice* at 79. A similar theme can also be located in Minow, “Justice Engendered” *supra* note 135 at 14, “... the perspective to seek out and appreciate a perspective other than ones own...”.

158. *Voice* at 156.

159. *Voice* at 114.

160. *Voice* at 101.

161. *Voice* at 73, 102, 134, 149, 174.

162. *Voice* at 174.

163. *Voice* at 174.

164. *Voice* at 90, *Discourse* at 46. Deborah Kearns suggests that even the most sophisticated and progressive liberal of the late twentieth century incorporates a vision of women as self-sacrificing into his work, “A Theory of Justice — and Love; Rawls on the Family” (1983), 18 *Politics* 2, 36. For a powerful critique of this “denial” interpretation of women’s identity see Robin West’s groundbreaking article, “The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Liberal and Radical Feminist Legal Theory” (manuscript; forthcoming 1 *Wisconsin Women’s Law Journal*, hereinafter cited as “Hedonic Lives”). West argues that if women are accurately understood as “giving selves” this has come about because of the “pervasive threat of violent and acquisitive male sexuality” which has resulted in women, driven by fear, “re-constructing themselves in a way that controls the danger and suppresses the fear. . . . This does not make her an altruistic person, it makes her a negative”. *Ibid.* at 15 and 22. In other words, women’s identity as “giving selves” is a “coherent, understandable” defence mechanism to survive patriarchal oppression, not authentic feminism. As the text makes clear, the ethic of care approach does not reduce to an interpretation of women as “giving selves”, it is not a servile interpretation of women’s moral character and promise. Indeed, later in her paper West also considers the possibility of an ethic of care absent the dangers of patriarchy. *Ibid.* at 38; See also her reflections on the importance of trust in human relations. *Ibid.* at 61-62.

in the House".¹⁶⁵ It should not be confused with passivity or delicacy, submissiveness or obedience, dependence or domesticity; it is not what Irigaray has posited to be a 'phallic feminine',¹⁶⁶ nor "a romantic prescription for chaining women to the classical definition of femininity".¹⁶⁷ Indeed, Gilligan's own example refutes such self-negation, for at least some of the women to whom she listened decided to have abortions, thereby demonstrating that care does not necessarily prioritize the other over the self. Rather, care attempts to consider the interests of the other in a responsive and responsible manner. The ethic of care includes care for oneself.¹⁶⁸ It denies the absolutist,¹⁶⁹ formalistic recourse to individual autonomy by favouring an "injunction against hurting"¹⁷⁰ so that we have to seriously and contextually make moral decisions and, at the same time, bear responsibility for that choice, and its consequences for others as well as ourselves. The ethic of care necessitates a keen consciousness of the "social consequences of action".¹⁷¹

If we relate the ethic of care to the arena of legal relations, to inquire into the possibility and direction of a "feminist contribution to justice,"¹⁷² a fundamental question becomes,

whether or not (law) is hurting society and whether or not it puts a barrier in the way of compassion and respect.¹⁷³

When you are inside the barrel with the lid sealed, it is difficult to know that it is a barrel you are imprisoned in. What the ethic of care may do is to provide a *corrigible and provisional* benchmark or vantage point by which to understand law, to interpret law, to question law, to evaluate law in the politico-historical conjuncture in which we now find ourselves.¹⁷⁴ As Kathy Ferguson notes, "Any thorough-going critique

165. *Women and Writing* 59 (1979).

166. Cited in Duchon, *supra* note 81, at 87.

167. K. Karst, "Women's Constitution" (1984), Duke L.J. 447, 480. Emphatically, although there is some verbal intersection, the ethic of care is not what MacKinnon has described as "contemporary industrial society's version of women ... docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic and domestic, made for child care, home care and husband care". "Agenda" *supra* note 146 at 530. Moreover, lest there be any confusion, I want to stress that nothing in my suggestions is premised upon the idea that the ethic of care grows out of the rosy private family life of women. For many women the family is anything but a haven in a heartless world; it is, in many instances, the locus of extreme domination, subordination, inequality and violence.

168. *Voice* at 139.

169. *Discourse*, at 46.

170. See *supra* note 161.

171. *Voice* at 167.

172. *Dunlap, Discourse* at 13.

173. *Voice* at 123.

174. For a useful discussion of why it is important to provide normative authority for legal praxis, see D. Cornell, "Two Lectures on the Normative Dimensions of Community in the

rests, ultimately, on a vision of an alternative possibility".¹⁷⁵ The discourse of care helps provide such a "critical ethical perspective".¹⁷⁶ If my earlier suggestions as to the relationship of contemporary law and violence are accurate then law, when measured against the ethic of care, is clearly found wanting. If difference, feminism and the ethic of care are connected, then the feminist recourse to law, as currently constituted, is problematic. The critique may not be sufficiently extensive, and the reconstruction may not go far enough.

But law itself should not be abandoned or abdicated because, in my opinion, feminists simply cannot afford to vacate the field. Rather it should be transformed, reconstructed, remade so as to come closer to the ethic of care, to be the socio-political concretization of the ethic of care, "to become more of a healer, less of a slayer".¹⁷⁷ Indeed, as Gilligan herself suggests, law is not monolithic, for inscribed within contemporary law there exist traces of a different voice in "the concept of equity, the recognition of differences in need".¹⁷⁸

c) *Equality Revisited*

i) *MacKinnon's Response to Difference*

It is true that in our history, stereotypical differences, both real and imagined have served primarily as convenient, "natural" justifications for impositions of burdens. It does not follow, however, that we cannot use differences progressively. Injustice does not flow directly from recognizing differences; injustice results when those differences are transformed into social and economic deprivation.

Ann Scales¹⁷⁹

Gilligan's work has received a mixed response from the feminist legal academic community. Some commentators have accepted the idea but not necessarily the substance of a different voice.¹⁸⁰ Others have been enthusiastic about the substance of the different voice and have attempted to apply it to their legal practice.¹⁸¹ Others have been skeptical.

Law" (1987), 54 Tenn. L.Rev. 327; "Toward a Modern/Post Modern Reconstruction of Ethics" (1985), 133 U. Pa. L.Rev. 291. See also K. O'Donovan, "Women's perspectives on the Rule of Law" (unpublished manuscript).

175. *The Feminist Case Against Bureaucracy* (1984).

176. Gilligan, "Reply to the Critics" (1986), 11 Signs 324, 327.

177. Dunlap in Discourse at 20.

178. *Voice* at 164.

179. "Feminist Jurisprudence" (1986), 95 Yale L.J. 1373, 1396.

180. See e.g., Suzannah Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986), 72 Va. L.Rev. 543; but see also her, "The Gender of Judges" (1986), 4 Law and Inequality 159.

181. Minow, "Justice Engendered" *supra*, note 135; Menkel-Meadow, "Toward Another View of Legal Negotiation" (1984), 31 U.C.L.A. L. Rev. 754, 763 fn. 28; "Portia in a Different

It has become commonplace within the legal academy to identify the work of Catharine MacKinnon as the most trenchant critique of difference, and particularly difference as articulated by Gilligan. The reasons for this widely held belief are not difficult to identify: MacKinnon has publicly challenged Gilligan's work¹⁸² and specifies that the critique of difference is one of the organizing themes for her book, *Feminism Unmodified*.

In this section I want to suggest that the first blush impression of Gilligan and MacKinnon as being locked in incorrigible conflict is oversimplistic. Although MacKinnon certainly does speak out against the espousal of difference, there remains within her work traces of an affection for difference, desirable if only the circumstances could be made appropriate. I want to suggest that the Gilligan-MacKinnon controversy, though very real, is not as irremediably polarized as it has been understood and that there is scope for compatibility between these two extremely important feminist theorists and practitioners.

In the introduction to *Feminism Unmodified* MacKinnon makes clear her critical concerns about the tendency to connect gender with difference on any level:

The second theme is a critique of the notion that gender is basically a difference rather than a hierarchy. To treat gender as a difference (with or without a French accent) means to treat it as a bipolar distinction, each pole of which is defined in contrast to the other by opposed intrinsic attributes. Beloved of left and right alike, construing gender as a difference, termed simply the gender difference, obscures and legitimizes the way gender is imposed by force.¹⁸³

Lest there be any doubt, she emphasises that her criticism is not aimed solely at biologically reductionist versions of gender as difference, but at all efforts to connect gender and difference:

It hides that force behind a static description of gender as a biological or social or mythic or semantic partition, engraved or inscribed or inculcated by god, nature, society (agents unspecified), the unconscious or the cosmos. The idea of difference helps keep the reality of male dominance in place.¹⁸⁴

Voice" (1985), 1 Berkley W.L.J.; Linda Krieger, "Through a Glass Darkly: Paradigms of Equality and the Search for a Woman's Jurisprudence" (1987), 2 Hypatia 45; Karst, "Women's Constitution" (1984), Duke L.J. 447; Mahoney, "Obscenity, Morals and the Law" in *Justice Beyond Orwell* 77 (Abella ed. 1985); Spiegelman, "Court Ordered Hiring Quotas After Stotts" (1985), 20 Harvard C.L.C.R.L.Rev.; E. Schneider, "The Dialectic of Rights and Politics" (1986), 61 N.Y.U.L.Rev. 589; F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 Harvard L.Rev. 1497; J. Rifkin, "Mediation from a Feminist Perspective; Promise and Problems" (1984), 2 Law and Inequality 21.

182. Discourse.

183. *Feminism Unmodified* at 3.

184. *Feminism Unmodified* at 3.

It is difficult to imagine a more total rejection of difference, or any of its potential justifications or foundations. Difference, for MacKinnon, is not about gender, but about power, force and the continued supremacy of men over women. Difference is a rationalization and legitimation of an illegitimate hierarchy which disadvantages women thereby reinforcing, rather than challenging, their status as “second class citizens”.¹⁸⁵

Difference, for MacKinnon, is a second order concept and experience. Power, or more precisely, the inequality of power, is the primary building block for a feminist analysis of social and legal relations. The meaning of gender and difference are predetermined by power relations between men and women, which are relationships of fundamental inequality. Consequently,

a discourse of gender difference serves as ideology to neutralize, rationalize, and cover disparities of power, even as it appears to criticize them. Difference is the velvet glove on the iron fist of domination. This is as true when differences are affirmed as when they are denied, when their substance is applauded or when it is disparaged, when women are punished or when they are protected in their name.¹⁸⁶

Thus, for MacKinnon, difference is a repressive dead end, “one strategy in keeping women down”.¹⁸⁷ Because it is a “conceptual tool of gender inequality, it cannot deconstruct the master’s house. Especially when it has built it.”¹⁸⁸ Difference cannot be salvaged for the feminist critique of patriarchy, and its espousal is “one of the most deceptive antifeminisms in society, scholarship, politics and law . . .”¹⁸⁹ An unmodified feminism rejects difference.

MacKinnon expands her critique of difference in “On Difference and Dominance: On Sex Discrimination”,¹⁹⁰ and discusses Gilligan’s work explicitly. Her basic disagreement with Gilligan is that the latter accepts and valorizes those values which men have either permitted women to have or have valued women for. Thus, she accuses Gilligan of failing to challenge at its core the male construction of gender relations — which are hierarchical and unequal — and worse, of legitimizing those relations through an affirmation of the “qualities and characteristics of powerlessness”.¹⁹¹

185. *Feminism Unmodified* at 4.

186. *Feminism Unmodified* at 8. Similar criticisms have been levelled against the N.F.F.’s. See for example Emmanuelle de Lesseps, “Le Fait Féminin: et moi?” in (1979), 5 *Questions féministes* 4, cited in Duchén *supra* note 81 at 21.

187. *Feminism Unmodified* at 22.

188. *Feminism Unmodified* at 9.

189. *Feminism Unmodified* at 8.

190. *Feminism Unmodified* ch. 2.

191. *Feminism Unmodified* at 39.

I am getting hard on this and am about to get harder on it. I do not think that the way women reason morally is morality "in a different voice". I think it is morality in a higher register, in the feminine voice. Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because their existence is defined in relation to men. Further, when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone. You aren't just deprived of a language with which to articulate your distinctiveness, although you are; you are deprived of a life out of which articulation might come. Not being heard is not just a function of lack of recognition, not just that no one knows how to listen to you, although it is that; it is also silence of the deep kind, the silence of being prevented from having anything to say. Sometimes it is permanent. All I am saying is that the damage of sexism is real, and reifying that into differences is an insult to our possibilities.¹⁹²

The discourse of difference, for MacKinnon, is insufficiently cognizant of power relations to be a fruitful strategy for feminism. The better approach is to view feminism through the prism of power, and to identify the conditions of inequality perpetrated by male supremacy. If difference is real it is because dominance pre-exists and determines the nature that difference, structuring it to men's advantage and women's disadvantage. The "dominance approach", as MacKinnon calls it,¹⁹³ provides an alternative, power-conscious, perspective from which to identify and challenge women's continued oppression and subordination. From this perspective difference is understood as problematic rather than emancipatory, mapping inequality rather than challenging it.

From the point of view of the dominance approach, it becomes clear that the difference approach adopts the point of view of male supremacy on the status of the sexes. Simply by treating the status quo or "the standard", it invisibly and uncritically accepts the arrangements under male supremacy. In this sense, the difference approach is masculinist, although it can be expressed in a female voice. The dominance approach, in that it sees the inequalities of the social world from the standpoint of the subordination of women to men, is feminist.¹⁹⁴

The gist of MacKinnon's critique, then, is that the espousal of difference sounds uncomfortably reminiscent of the old stereotypes¹⁹⁵ and clichés that have been traditionally used by men to confirm the inferiority

192. *Feminism Unmodified* at 39 (footnotes omitted).

193. *Feminism Unmodified* at 40.

194. *Feminism Unmodified* at 42-43.

195. For a particularly useful analysis and critique of the dangers of stereotyping which has reinforced the inequality of women, blacks, Jews and the lower classes, see Sander L. Gilman, *Difference and Pathology: Stereotypes of Sexuality, Race and Madness* (1985).

of women, to legitimize inequality and to maintain the relations of domination and subordination. MacKinnon argues that the affirmation of difference does nothing to empower women, and indeed, because the foot is on the neck¹⁹⁶ it is more like masculinist ventriloquism. The authentic, unmodified voice of feminism is the dominance approach, because only it “strives towards equal power in the social life”.¹⁹⁷ For MacKinnon, difference may be feminism’s double-cross.¹⁹⁸

ii) *Reflections on MacKinnon*

Far too often, however, feminists appear too confident that we have successfully freed ourselves from the constraining categories and norms of the male-stream thought within which all of us in this generation were trained . . . It is hard to know what to save and what to discard from male stream thought as we proceed forward on our journey. Some of us have clearly saved too much and are overburdened with antique baggage which slows our progress. Others have, perhaps, discarded rather too much too early.

Jill McCalla Vickers¹⁹⁹

MacKinnon’s comments are both timely and important. They are timely in that they provide an important counterbalance to some of the more euphoric elements within feminism whose faith in difference was perhaps leading them towards romanticism and idealism,²⁰⁰ and was insufficiently cognizant of the structures and actors of resistance. Her insights are important in that they remind us, once again, that there is “no such thing as ‘keeping out of politics’”²⁰¹ and that gender, like morality, has as a constitutive element questions of power and powerlessness. For example, if we return to Gilligan’s suggested transformation of the girl/boy, neighbour/pirate game the problem is even more serious than the boy opting out. The very real danger may be bringing the pirate home . . . for if pirates rape and pillage, then the new game may be the pirate raping the girl next door!²⁰²

MacKinnon reminds us that, historically, difference has been perceived as deviant, inferior, invalid; that it has inscribed within it an ideological weight that disadvantages women. Her concerns about the danger of

196. *Feminism Unmodified* at 30.

197. *Feminism Unmodified* at 45.

198. Elizabeth Meese, *supra* note 57 at 75-76.

199. In *Feminism in Canada*, *supra* note 14, at 44-45.

200. See for example, Sara Ruddick, “Maternal Thinking” and “Preservative Love and Military Destruction” in *Mothering*, *supra* note 18 at 213, 231; Barbara Love and Elizabeth Shinklin, “The Answer is Matriarchy”, *ibid* at 275.

201. George Orwell, cited in W. Mitchell, *The Politics of Interpretation* 3 (1983).

202. I wish to thank Colleen MacKay for suggesting this response to Gilligan’s proposal.

difference, with it tendency to reconfirm the traditional stereotypes,²⁰³ thereby entrenching rather than dislocating hierarchy and inequality, are made the more real when we realize that both anti-feminist women and contemporary Christian fundamentalists also espouse difference, claiming that men are "aggressive, dominant, logical, independent, active and task-oriented", while women are "submissive, intuitive, dependent, nurturant, supportive, patient and person-oriented".²⁰⁴ No doubt such correspondences are a serious cause for concern for any progressive movement, and justify a critical skepticism towards invocation of difference. However, skepticism is not rejection, and MacKinnon appears to favour rejecting *in toto* the discourse of difference. But can feminism afford to surrender the ideology of difference to masculinist hegemony? In the past, antifeminists have used, and will continue to use, difference in support of their political agenda. Even if MacKinnon is correct that, historically, difference has contributed to the inferiorization of women, does that mean that difference is inherently incapable of being salvaged for feminism, reconstructed and revalued so as to be a positive, even emancipatory, ideology? As I understand her writings, MacKinnon disagrees. Her preference, I think, is for a "degendering"²⁰⁵ of society, for gender is a construct of hierarchy, a product of the inequality of power between men and women. The validity of such a position depends upon the validity of MacKinnon's "dominance thesis" and its central concept, power. It is to a discussion of these issues that we can now turn.

a) *MacKinnon on Power*

... the pitfall of being reduced into joining the oppressor under the pretense of sharing power

Audre Lorde²⁰⁶

203. See for example Freud, "Some Psychical Consequences of the Anatomical Distinction Between the Sexes" in *On Sexuality* Vol. 7, 342 (A. Richard ed. 1977); T. Reik, *Of Love and Lust: On the Psychoanalysis of Emotional and Sexual Emotions* (1967).

204. See for example, W. Peter Blitchington, "God had A Purpose in Creating Two Sexes" *Sex Roles and the Christian Family* Ch. 3 (1985); Marabel Morgan, *The Total Woman* (1975).

205. I take this term from Nancy Chodorow, "Gender, Relation and Difference in Psychoanalytic Theory" in *Future of Difference* (1980) at 3. This claim is based upon my understanding of MacKinnon's argument. Her premise is that power, in the nature of hierarchy and inequality, domination and subordination, pre-exists. Gender is encoded with these pre-existing power relations, "the eroticization of dominance and submission creates gender, creates woman and man in the social form in which we know them". *Feminism Unmodified* at 50. To challenge the conditions of inequality necessitates a challenge to the formative structures of powerlessness, including gender. Society has to be de-gendered, for gender is premised upon inequality. As the overall theme of this article might suggest, my preference is for a reconstitution of gender not its eradication. See also R.W. Connell, *Gender and Power*, 286-293 (1987).

206. *Sister Outsider* 118, (1984).

Si les femmes veulent prendre le pouvoir à la manière des hommes, ce n'est pas la peine, c'est ce que nous voudrions changer justement, toutes ces notions et ces valeurs.

Simone de Beauvoir²⁰⁷

An overview of MacKinnon's discussion of power leaves one dissatisfied, for her analysis is more assertion than analysis. Although, on occasion, she posits that feminism will transform power²⁰⁸ she says very little on what that transformation might mean. Rather, as we have seen, MacKinnon filters her analysis of power through the prism of gender and its connection with hierarchy, authority and inequality; domination and subordination; force and violence.

Her argument is that male power is pervasive and systemic, not only in the public and private realms but also epistemologically, methodologically and philosophically. As she says elsewhere, male dominance is "metaphysically nearly perfect."²⁰⁹ In short, women are both personally and structurally disempowered: men have power, women do not. Consequently, the goal of feminism must, first and foremost, be to enable women to have the same power as men, and then women can begin to articulate more authentically their aspirations.

Is this an adequate understanding and conceptionalization of the economy of power?

Although it is an instructive, readily accessible and critical approach to power, its totalistic viewpoint is a cause for concern.²¹⁰ MacKinnon appears to accept without question what elsewhere²¹¹ she identifies as a male conception of power: domination. Her claim that male domination is all pervasive is a quantitative conception of power, but not a qualitative one. It does not address the issue of the nature of power. Moreover, it seems to me that her demand that women are entitled to equal power as men assumes a zero-sum conception of power: that more power for women will mean less power for men.

207. *Les écrits de Simone De Beauvoir* (1979), C. Francis, E. Gontier (eds.) at 589.

208. See for example, *Feminism Unmodified* at 23 and 53.

209. "Marxism, Feminism, Method and the State: Towards a Feminist Jurisprudence" (1983), 8 *Signs* 613 [hereinafter cited as "Feminist Jurisprudence"]. See also V. Held, "Feminism and Epistemology: Recent Work on the Connection between Gender and Knowledge" (1985), 14 *Philosophy and Public Affairs* 296; Jill McCalla Vickers, "Memoirs of an Ontological Exile", in *Feminism in Canada*, *supra* note 14 at 27.

210. For similar concerns about the prevalence of "generic" statements about power/powerlessness, shared by both sociologists and feminists see Ann Duffy, "Reformulating Power for Women" (1986), 23 *Can. R. Soc. and Anth.* 22.

211. "To us it is a male notion that power means someone must dominate" *Feminism Unmodified* at 23. Kathy Lahey appears to accept an essentialist conception of power: "the very concept of power is a male vision" and "the ultimate sources of power are violence and tyranny", "Equality and Women's Specificity in Feminist Thought" at 7 (unpublished manuscript).

I think such an approach manifests a unilateral conception of power. It understands power in the Weberian sense of "power over",²¹² a negative and repressive approach, what Foucault identifies as a juridical conception of power.²¹³ But power is more than simply pervasive and systemic; it is also heterogeneous, polymorphous and multifaceted.²¹⁴ Power can also be understood in the sense of "power to" as well as "power over". "Power to" is power as a cognate of freedom, a progressive, emancipatory and potentially transformative conception of power, a conception which emphasizes the creative, capacity-enhancing, ability-encouraging variations of power.²¹⁵ This is a qualitatively different conception of power. Men may understand and use power in its imperialistic guise in order to crush women (other men, and nature) but that does not mean that "power over" is the immutable essence of power.

212. Weber defines power as "... the chance of a man or a number of men (sic) to realize their will in a communal action even against the resistance of others who are participating in the action", in *From Max Weber: Essays in Sociology* 180 (H. Gerth and C. Wright Mills eds. 1958).

213. Foucault, *Power/Knowledge* (1972).

214. The following reflections on power are influenced, in part, by the work of Foucault although they aspire to a very different, that is optimistic, agenda than his. He suggests that traditional conceptions of power are based upon three assumptions: 1) power is possessed; 2) power is primarily coercive, it is a repressive prohibition backed by sanctions, and 3) power is centralized and tends to be hierarchical, it flows from the top down.

Foucault argues that these assumptions unduly constrain our understanding of power, that power has many variations beyond the juridical conception. Thus he argues that power is exercised rather than possessed, thereby emphasizing a more relational understanding of power. Second, we can understand power as productive as well as repressive. This claim becomes most apparent through his discussion of the connection between knowledge and power. Knowledge as power constructs, creates and moulds our understanding of ourselves, our relations and our world. Power, therefore, can be proactive and creative, rather than just sanction-determined. Third, and as a correlative of his first and second theses, if power is exercisable, relational and creative, then it can be located elsewhere than in centralized authorities. Put differently, power is a micro-phenomenon as well as a macro-phenomenon (although the two are inter-related), it can be exercised through our everyday relations, from the bottom up, as well as from the top down, as localized centres of resistance, reconstruction and empowerment, as well as domination, either on the micro or macro levels. See Foucault, *Power/Knowledge* (1972); *Discipline and Punish* (1979); *The History of Sexuality* (1980); Jana Sawicki, "Foucault and Feminism: Toward a Politics of Difference" (1986), 2 *Hypatia* 23; Irene Diamond, Lee Quinby, *Feminism and Foucault: Reflections on Strategies of Resistance* (1988).

Though I do not propose some meta-normative project, I am also more optimistic than Foucault who resists envisioning transformation, mostly because of his anti-humanism, his post-modern skepticism.

215. Yolande Cohen, in *Feminism in Canada*, *supra* note 14, at 236 and Geraldine Finn *ibid.* at 302. For example, certain of the privileges of citizenship can be understood as "power to", rather than "power over". The Oxford English Dictionary also suggests these various conceptions, beginning with "power to" but ending with "power over": "The ability to do something ... possession of control or command over others; domination; government; sway; authority ... ability to compel obedience ... wage war. ..." See also Moi, *Supra* note 2 at 124-125 for a discussion of Cixous' conception of "power to".

Feminism may pose the opportunity to conceptualize and nourish another, emancipatory side of power, a side that expands our horizons rather than curtails them, a side that nurtures our personhood rather than stultifies it, a side that fosters care for our inherent human dignity rather than inflaming the festering sores of “anxious privitism”²¹⁶ and possessive individualism.²¹⁷ Feminism, rather than working within and thereby reproducing the androcentric interpretation/imposition of power, may be able to challenge the very meaning of power itself. Difference, with its substantive emphasis on the ethic of care, may fit with this alternative conception of power.

However, because of her unidimensional conception of power, MacKinnon understands “difference” as “powerlessness” rather than “power to”.²¹⁸ Although MacKinnon is correct to point out that, historically, the awareness of difference has operated to women’s disadvantage, and that women’s caring role has been part of their strategy for survival, we must be careful not to make this into an essentialist thesis that difference = domination/subordination. Such an approach ignores the factor of human — particularly male — agency in making this correlation. But, again, what has been socially constructed by males is capable of being (de)reconstructed by females and profeminist males. Difference can be interpreted, codified and understood as being affirmative; the important question is how? MacKinnon, therefore, may have failed to challenge male supremacism at its core. Rather than attempting to reconstruct power, she takes the male interpretation to be the sole interpretation, thereby working within the paradigm, rather than transforming it.

This may also lead her into the dangers of ahistoricism in that her conception of the totalizing dualistic hierarchy of male/female prohibits her from accounting for those women, herself included,²¹⁹ who have managed to resist the pervasiveness of patriarchal ideology and who have voiced their opposition. Moreover, historically, some women have had access to power in both its androcentric and expansionist manifestations. Examples can be found not only in law, but also in politics and literature.²²⁰ There is a herstory that cannot be reduced to subordina-

216. Gabel, Book Review, R. Dworkin, *“Taking Rights Seriously”* (1978), 91 Harvard L.Rev. 302.

217. C.B. MacPherson, *The Political Theory of Possessive Individualism* (1962).

218. The closest she comes to discussing “power to” is her assertions that “female power” is a “contradiction in terms”, a “misnomer”. *Feminism Unmodified* at 53.

219. Thus, for example, at one point she posits that she is “existentially amazed” to be speaking at all. *Feminism Unmodified* at 163.

220. Toril Moi, *supra* note 2 at 64; Duchon, *supra* note 81 at 92. Michelle Zimbalist Rosaldo, “Women, Culture and Society: A Theoretical Overview” *supra* note 4 at 17-42. In politics, see

tion.²²¹ MacKinnon's conception of power is too all encompassing, it is an understanding which is underdeveloped for the explanatory burden it is required to carry.

Ultimately, I fear that MacKinnon comes perilously close to reductionism by developing a unidimensional explanation that is monolithic, thereby denying differences, important differences, not only

Dorothy Smith, "The Problem of the Main Business", discussing the power of Chilean women, in the face of circumstances significantly harsher than those which face many North American women; Elizabeth Janeway, *Powers of the Weak* (1980). Ann Duffy, "Power" *supra* note 210 discussing the powerful influence of a variety of middle and upper class Canadian Women in the Canadian culture and polity. See also Susan Ostrander in the American context, "Upper-class Women: Class Consciousness as Conduct and Meaning" in *Power Structure Research* 73-96 (G.W. Domhoff ed. 1980).

See also N.C. Dye, *As Sisters and As Equals* (1980); J. White, *Women and Unions* (1980); R. Cavendish, *Women on the Line* (1982); J. Wajeman, *Women in Control: Dilemmas of a Workers Co-operative* (1983) M. Ryan, "The Power of Women's Networks: A Case Study of Female Moral Reform in Antebellum America" (1979), 5 *Feminist Studies* 66. Veronica Strong-Boag, *The Parliament of Women: The National Council of Women of Canada 1893-1929* (1976); M. Stacey and M. Price, *Women, Power and Politics* (1981); M. Young and P. Willmott, *Family and Kinship in East London* (1962); B. Campbell, *Wigam Pier Revisited* (1984); C. Smith Rosenberg, "The Female World of Love and Ritual: Relations Between Women in Nineteenth Century America" (1975), 1 *Signs* 1; E. Dubois et al., "Politics and Culture in Women's History: A Symposium" (1980), 6 *Feminist Studies* 26.

Again, if we look beyond our own cultures there is some evidence to indicate that women do exercise power. For overviews see Joyce Neilsen, "From Corrective to Creative Progress in Sex Stratification: Sociological and Anthropological Contributions" (1979), 2 *International Journal of Women's Studies* 324; Sharon Tiffany, "Women, Power and the Anthropology of Politics: A Review" (1979), 2 *International Journal of Women's Studies* 430. V. Mahler, "Work, Consumption and Authority within the Household: A Moroccan Case" in *Of Marriage and the Market* 69 (K. Young ed. 1981); A. Hamilton, "A Complex Strategical Situation: Gender and Power in Aboriginal Australia", in *Australian Women: Feminist Perspectives* (N. Grieve and P. Grimshaw eds. 1981). Black herstory has been particularly important in illuminating the narrowness of "women as only victim" analysis. See Audre Lorde, "An Open Letter to Mary Daly" in *This Bridge Called Me Back*, *supra* note 69, at 94; Alice Walker, *In Search of Our Mothers Gardens: Womanist Prose* (1983); Carol Stack, *All Our Kin: Strategies for Survival in Black Communities* (1975); Angela Davis, *Women, Race and Class* (1981). In the area of legal relations, Shelley Gavigan suggests that there exists an as yet unrecounted history of women's powerful resistance to masculinist law, "Bringing on the Menses: The Criminal Liability of Women and the Therapeutic Exception in Canadian Abortion Law" (1986), 1 *Can. J.W.L.* 279.

221. MacKinnon would possibly portray this discussion as an example of the male response in which "the success of our (women's) survival is used to delegitimize what we have survived to say, our critique", *Feminism Unmodified* at 131. Such a criticism would miss the point of my suggestion for I am not claiming that things aren't bad for women, rather it is that the oppression is not total. Moreover, MacKinnon's reliance on survival is an inadequate foundation upon which to prioritize her interpretation and critique ... other women who disagree with MacKinnon are also survivors. To disagree is not necessarily to delegitimize.

I think that elements of a better approach are contained, in an earlier claim by MacKinnon that, "... feminism relies on the ultimate possibility of resistance, even though the feminist analysis of the crushing totality of subordination has difficulty accounting for it." "Toward Feminist Jurisprudence" (1982), 34 *Stanford L.Rev.* 703, 720. Although she tends to still overplay the domination element, there is an awareness that women have a power to resist.

inter-gender but also intra-gender. It renders “her impervious to the nuances, inconsistencies and ambiguities”²²² of social interaction. If we accept MacKinnon’s “metaphysically nearly perfect” approach, how do we explain what Adrienne Rich has described as “the extraordinary will-to-survive in millions of obscure women”,²²³ that the gynocide has not already taken place, that the Atwoodian dystopia²²⁴ is not where we are today. If women have been the victims of such universal and unrelenting domination and misogyny (which is a different claim from pervasive and systemic inequality) then how has womankind survived and, more importantly, how is feminism now able to articulate its critique of male hegemony. How does feminism know? I suggest that, at least in part, this is due to a nascent counterparadigm of power, a resilient, supportive, encouraging, expansive and deviationist subpower that has allowed the community of women to continue despite an extremely adverse political ecology.²²⁵

Finally, not only does her approach run the risk of falsifying the past, more depressing still, it may also foreclose a feminist future. Her approach is pervaded by a politically paralysing negativity, that denies the emancipatory potential of difference, by claiming that we cannot know what women would say or write or do because the foot is on the throat.²²⁶ Though metaphorically powerful, and marvellously capturing,

222. Toril Moi, *supra* note 2 at 30.

223. *On Lies, Secrets and Silence* 255 (1979). See also Kalpana Ram, “Sexual Violence in India” (1982), *Refractory Girl* 2.

224. Margaret Atwood, *The Handmaid’s Tale* (1985).

225. A cautious parallel may be drawn here between the position of women in patriarchal society and black slaves in antebellum America. For a long time many scholars emphasized the repression and damage caused to black people by slavery. However, without underplaying or denying the horrendous nature of the system of slavery, black and radical scholars in the 1970’s also highlighted not only the incredible resistance of black people but also the richness and beauty of their culture even in these times. See, for example, Eugene Genovese, *Roll Jordan Roll: The World the Slaves Made* (1974); Herbert Gutman, *The Invisible Fact: Afro-Americans and their Families 1750-1925* (1972).

226. *Feminism Unmodified* at 30. MacKinnon is aware of this to some extent. In concluding an address in honour of two women judges she opines,

If it seems that this (discussion of feminist loyalties) is not very concrete, I think it is because we have no idea what women as women would have to say. I’m evoking for women a role that we have yet to make, in the name of a voice that, unsilenced, might say something that has never been heard.

Unwilling to leave her audience with such an ungraspable thought she concludes,

I will hazard a little bit about its content. In the legal world of win and lose, where success is measured by other people’s failures, in this world of kicking and getting kicked, I want to say: there is another way. Women who refuse to forget the way women everywhere are treated everyday, who refuse to forget that *that* is the meaning of being a woman, no matter how secure they might feel in having temporarily escaped it, women as women will find that way, (*Feminism Unmodified* at 77).

MacKinnon wants to speak of how things could be otherwise and yet appears unable to find

in one pithy phrase, the patriarchal nature of contemporary social relations, I think that this may go too far in its relentless rhetorical reductionism.²²⁷ Rather than being empowering, MacKinnon's may be a jurisprudence of despondence.²²⁸

Put differently, how are we to *ever* know when the foot is off the throat? How are we to know that MacKinnon's articles, speeches, legislation have any more credibility as the authentic, unmodified feminist voice than that of Cixous or Gilligan? By what criteria are feminists to evaluate their praxis if everything they do is a distorted gurgling caused by the rugged heel of masculinist supremacy?²²⁹ Difference provides the possibility of establishing an affirmative — but fundamentally corrigible, and possibly only transitory — vision which can provide both a concrete alternative standpoint from which to critique masculinist hegemony as well as suggesting a positive direction for feminist practice and theory. Difference provides both a centre of resistance and a potential panorama — severely limited no doubt — to begin the process of transformation. It provides a gap in which to articulate an alternative normative order. Simple critique and negation of everything masculine is not enough ... it is trashing but not reconstructing. Nor is it adequate to say that feminists must wait until they have destroyed masculinist supremacy and gained access to power and then, and only then, will they begin to imagine what otherwise might mean ... feminism, I believe, must build as it goes. In my opinion, feminism must articulate, create and develop alternative — but corrigible — visions and practice that will concretize and tangibly inspire those who seek social transformation. The discourse of difference provides the

the words. The "content" is frustrating rather than helpful because MacKinnon has already debarred herself from access to the discourse of difference, where at least the words "empathy", "care" or "solidarity" might help.

227. Toril Moi, *supra* note 2 at 29.

228. Indeed, when asked, "how do you maintain hope for future gains [for women]" MacKinnon replied, "I'm more into determination. I am agnostic on the subject of hope." Cited in Karst, "Women's Constitution" *supra* note 167 at 476, n. 113.

229. Even more problematic still are MacKinnon's suggestions that her feminism is the true feminism, that all others are complicit in collaborative with, male supremacy or, more benevolently, falsely conscious. See pp. 5, 49, 13, 198-205, 216-218. For example, in commenting on the female sexuality debate, she posits,

I think that sexual desire in women, at least in this culture, is socially constructed as that by which we come to want our own self annihilation. That is, our subordination is eroticized in and as female, in fact, we get off on it to a degree, if nowhere near as much as men do. This is our stake in this system that is not in our interest, our stake in this system that is killing us. I'm saying femininity as we know it is how we come to want male dominance, which most emphatically is not in our interest. Such a critique of complicity ... does not come from an individualistic theory. *Feminism Unmodified* at 54.

See also "Standards of Sisterhood" *Broadside* 6 (Dec. 1985/86 vol. 7, no. 3).

opportunity for a politics with substance,²³⁰ a politics that refuses to succumb to the moral nihilism of our post-modern condition.

If the preceding discussion of resistance and resilience has any validity, it helps to unearth the historically significant ways in which power, in its affirmative manifestations, has proved invaluable for women in general, and for feminism, as a movement, in particular. Moreover, the most recent wave of feminisms has developed a praxis that incorporates at least some values associated with the ethic of care, and is itself a specific materialization of “power to”: consciousness-raising.

There appears to be consensus among feminists that, whatever its weaknesses, consciousness-raising has been of pivotal significance in the emergence of contemporary feminism.²³¹ In so far as it provided non-hierarchical, open, supportive fora for women to articulate their experiences of male domination, it allowed women to recognize their communality in isolation, the pervasiveness of patriarchy, and the potential for solidarity among women. It provided the participants with a new and critical understanding of their lives and roles, thereby reinforcing their self-worth, self-esteem and self-respect. As well as being a “therapeutic experience”, consciousness-raising was also a “politicizing agent”²³² and, as such, it laid the foundation for the transformation from powerlessness to partial empowerment, in large part, through its valorization of their perspective as women. Moreover, building on this foundation of mutuality, it provided support for the newly emergent feminist practices: individual and/or collective, private and/or public. As MacKinnon once opined in her earlier work, “consciousness-raising is (feminism’s) quintessential expression”,²³³ and, I suggest, the praxis it inspires is what makes it a cognate of “power to”.²³⁴

230. Indeed feminism can certainly learn something from marxism’s failures on this point because at least one reason for the emergence of the totalitarian eastern bloc was the failure of Marx and his successors to develop a conception of post bourgeois society beyond vague predictions of nonalienated human interaction. See “On The Jewish Question: Early Writings of Karl Marx” (1964), T.B. Bottomore (ed.); *The Economic and Philosophical Manuscripts of 1844*.

231. For discussions, see e.g., P. White, S. Goode, “The Small Group in Women’s Liberation” in (1969), 1 *Women: A Journal of Liberation* 56; Pamela Allen, *Free Space: A Perspective on the Small Group in Women’s Liberation* (1980); Barky, “Towards a Phenomenology of Feminist Consciousness” in *Feminism and Philosophy*, *supra* note 8; Nancy McWilliams, “Contemporary Feminism, Consciousness-Raising, and Changing Views of the Political” in *Women in Politics* 157 (Jane Jacqueline, ed. 1974); C. MacKinnon, “Agenda” *supra* note 5; S. Law, “Equality, Power and the Limits of Law” (1986), 95 *Yale L.J.* 1769, 1784-1786; K. Lahey, “Until Women Themselves Have Told All They Have To Tell . . .” (1985), 23 *Osgoode Hall L.J.* 519.

232. McWilliams, *ibid.* note 5 at 164.

233. “Agenda”, *supra* note 146 at 535.

234. It might be argued by some that consciousness-raising is appropriate for womens groups to communicate independent of the silencing presence of males, but that it is unsuited to a

If we expand our horizons beyond law, and shift our focus from power and politics as they have been traditionally — and narrowly — understood, we can, once again, learn from literature. For example, there has been an influential, radical heritage in literary criticism — traces of which can be detected in Barthes, Kristeva, Benjamin²³⁵ and Stein²³⁶ that suggests an alternative conception of power based upon laughter. A particularly poignant example of this is to be found in Russian literary critic Mikhail Bakhtin's reinterpretation of Rabelais. Bakhtin argues that anger, even when justified, is only one of several possible transformative strategies available to us. He posits that the power of laughter can be just as subversive as anger, and points to the power of the carnival to delegitimize and topple the hierarchy of both church and state, and to obliterate what had appeared to be inevitable differences and to highlight new, mutable ones.²³⁷

In the same de-ranging vein, some of those who have been the victims of domination and oppression have displayed their resistance by reclaiming, affirming and revalorizing that which has been used to oppress them. For example, feminists, invoking the power of naming, have claimed and reinterpreted "chauvinism", disconnecting it from its patriotic context, and canonizing it as one of feminism's pejorative superlatives. Similarly, much of the work of Mary Daly is an attempt to support the traditionally devalued recipients of labels such as "hag", "spinster", "witch" and "shrew".²³⁸ And again, at least in certain, and not necessarily feminist, circles, the use of the generic "he" and "man" are considered inappropriate while "chairperson" and "spokesperson" are accepted as both desirable and normal. Other oppressed communities

larger transformative programme. Such an argument assumes that males are incapable of the intersubjective awareness required for such an experience. If, however, one subscribes to modernism, as I do, then there is hope that males can develop such abilities. There is, of course, the logistical problem of making consciousness raising effective on a larger level but it is not clear to me that this has any necessary connection with gender.

235. See for example,

The class struggle, which is always present to a historian influenced by Marx, is a fight for the crude and the material things without which no refined and spiritual things could exist. Nevertheless, it is not in the form of the spoils which fall to the victor that the latter make their presence felt in the class struggle. They manifest themselves in this struggle as courage, humour, cunning, and fortitude,

Walter Benjamin, *Illuminations* 254-55 (Hannah Arendt, ed. 1964).

236. See e.g., Jo Anna Isaak, "Gertrude Stein: The Revolutionary Power of a Woman's Laughter" in *The Ruin of Representation and Modernist Art and Texts* 93-123 (1986).

237. M. Bakhtin, *Rabelais and His World* (1968). For further discussions see generally, R.M. Berrong, *Rabelais and Bakhtin* (1986); D.N. Losse, *Rhetoric at Play: Rabelais and Social Eulogy* (1980); D.M. Frame, *François Rabelais* (1977); A.F. Chappell, *The Enigma of Rabelais* (1978).

238. See for example, *Gyn/Ecology* (1979); *Wickedery* (1987).

have reappropriated and revalorized terms that have been overlaid with oppression. Some blacks now use “sweet nigger” and gays, “faggot”, and lesbians, “dyke”, affirmatively, supportively.

In short, because there are no immutable essences, difference does not necessarily have to be identified with inferior, but rather the relative value will depend upon the circumstances of power — a concept that must be understood expansively, in order to account for important examples of resistance and partial reconstructions.

b) *MacKinnon's Positive Vision: Equality*

MacKinnon is fully aware that the critique of male supremacism cannot, on its own, cause the decline of the masculinist empire, nor can it capture the potential of feminism for social transformation. Having rejected the discourse of difference she must articulate her own suggestions for post-patriarchy. *Feminism Unmodified* suggests that feminist agenda must be located in the discourse and praxis of “equality”.²³⁹

Feminism, “as a political movement for civil equality”,²⁴⁰ seeks to “eradicate . . . gender hierarchy”²⁴¹ and end “enforced subordination, limited options and social powerlessness — on the basis of sex, among other things”.²⁴² “Equality as anti-domination”,²⁴³ is not the “abstract equality of liberalism”,²⁴⁴ is more than a demand for access to the “male world” and “male pursuits”, although this is included.

Feminism seeks to empower women in our own terms. To value what women have always done as well as to allow us to do everything else. We seek not only to be valued as who we are, but to have access to the definition of value itself. In this way our demand for access becomes also a demand for change.²⁴⁵

Thus, for MacKinnon, equality is something much more significant than liberalism's espousal of equal opportunity, which is itself a structural limitation. Feminism demands to participate in the valorization process itself, to transform rather than merely reform. Equality as anti-domination is not merely the opportunity to be the *same* as men, thereby maintaining maleness as the essential referent,²⁴⁶ or even to reverse the hierarchy. Rather equality, by enabling women to participate in the valorization process, provides the opportunity to reconstruct the very

239. *Feminism Unmodified* at 15.

240. *Feminism Unmodified* at 206.

241. *Feminism Unmodified* at 22.

242. *Feminism Unmodified* at 22.

243. Littleton, *Reconstructing*, *supra* note 79.

244. *Feminism Unmodified* at 16.

245. *Feminism Unmodified* at 22.

246. *Feminism Unmodified* at 34; see also Minow, “Justice Engendered”, *supra* note 135.

conditions of human interaction, male-determined conditions of domination and subordination, so that power is no longer identified with dominance.²⁴⁷

The claims that feminism aspires to the transformation of both equality and power are central to MacKinnon's work, but are unfortunately underdeveloped, mostly because they remain abstractly aspirational and experientially unsituated. Rephrased, how does she propose to transform equality and power relations? No answer is forthcoming. One is tempted to suggest the difference approach,²⁴⁸ but we are prohibited from such a strategy because difference is a male determined ideology, false-consciousness. But why is equality any less male determined than difference? Surely, it too has been one of the master's tools premised as it is on maleness being the benchmark.²⁴⁹ As I understand MacKinnon, her response is that equality as anti-domination reconstructs equality to be different from its male conception of "sameness", it is a transformative vision of equality. But the question remains, how does this reconstruction come about? If "equality", itself traditionally male,²⁵⁰ can be remade by feminism, then why cannot "difference" also be a component in the transformational process, disconnected from being complicit in women's subordination, reconstructed to be pivotal in their emancipation. Indeed, it has the advantage over equality of providing some concrete, specific

247. *Feminism Unmodified* at 23.

248. This integrative approach is suggested by both Angela Miles *supra* note 21 and Colleen Sheppard *supra* note 14. As Sheppard pithily posits, "Equality thus requires the embracing of social diversity" *supra* note 14 at 200. See also Christine Littleton, who attempts to develop a conception of "equality as acceptance" where difference would be "costless", so that, difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived out equality of those persons, (Reconstructing *supra*, note 79 at 1284).

She also points out, however, that she is not celebrating difference (at fn. 79).

249. Moreover, equality itself may not push the challenge far enough. It comes dangerously close to petitioning androcentrism for fairness and justice and as such may ultimately be tied to paternalistic benevolence. Particularly poignant in this light is Canadian feminists' emphasis upon equality claims. In the course of the patriation process feminists successfully campaigned to have their equal rights entrenched in the Charter. However, the Meech Lake brotherly compact threatens to undercut the feminist successes achieved less than a decade ago. What the male state has granted, equal rights for women, it can also take away. See A.Z. Dobrowolsky, "Meech Lake" (unpublished manuscript); R.A. Samek, "Untrenching Fundamental Rights" (1982), 27 McGill L.J. 755.

250. MacKinnon acknowledges as much, at least in so far as equality means sameness. See *Feminism Unmodified* at 34. As Ann Scales points out, "In this country, the engine of the struggle for equality has been aristotelian: Equality means to treat like persons alike, and unlike persons unlike" in "The Emergence of Feminist Jurisprudence: An Essay" (1986), 95 Yale L.J. 1373, 1374 (footnote omitted). See also Littleton, "Reconstructing", Introduction and Part II, *supra* note 79, for an outline of the concerns about the feminist espousal of equality, given its "phallocentricity".

elements which can provide guidance — always corrigible — for the direction in which the transformation might go.

Although MacKinnon's discussion of equality is disconcertingly under-developed, we can develop a more specific understanding of her reconstructive vision if we leave the spheres of jurisprudence and law, and briefly discuss her reflections on sport.²⁵¹ Indeed, the shift of focus may be more apparent than real for the parallels between male-stream law and sport may be very strong.

MacKinnon argues that traditional approaches to women in the athletic community, have been based upon the gender-hierarchy paradigm, thereby inferiorizing, excluding, and disadvantaging women. She argues that liberal feminism's demand for equal opportunity and the termination of sex-role stereotyping is inadequate.

An alternative, "radical feminist analysis"²⁵² challenges the gender hierarchy system and, "moves to transform the meaning of athletics, of sport itself".²⁵³ MacKinnon's view of the radical feminist perspective is that there is a need for much more than an opportunity "to play with the boys"²⁵⁴ for that would still allow the boys to determine the nature, norms and values of the sport.²⁵⁵ The radical feminist approach strives towards the "creation of a new standard, of a new vision of sport",²⁵⁶ one that encourages physical self-respect, autonomy, integrity and self-possession. As a transformative vision it strives to break with the repressive stereotypes of femininity and masculinity, to open up new horizons.

The discussion of the "reevaluation of sport" from a feminist perspective is important, not just for its own sake but also because it is one of the few occasions when MacKinnon indicates more specifically what her positive vision may be. It is a rejection of objectification and subordination in order to allow women to experience their bodies "as if they are our own".²⁵⁷ It is a vision of autonomy, integrity, self-worth, and self-determination. Significantly, as MacKinnon is keen to point out, this is not the same as femininity, for that serves "the interests of men", whereas her vision serves the interests of women.

Again the question arises, how are women able to experience and bring about this reevaluation and reconstruction of sport? MacKinnon writes in the present tense and shares her experience and that of other

251. *Feminism Unmodified* Ch. X, "Women, Self-Possession and Sport".

252. *Feminism Unmodified* at 118.

253. *Feminism Unmodified* at 119.

254. *Feminism Unmodified* at 120.

255. *Feminism Unmodified* at 121.

256. *Feminism Unmodified* at 123.

257. *Feminism Unmodified* at 121.

women, thereby indicating that the radical feminist transformation is already happening, at least in certain limited spheres. However, if the power-hierarchy thesis is to hold, then such feminist "deviations" would be impossible. As an explanatory theory, although providing important insights, the power-hierarchy thesis goes too far. Perhaps it would be better to understand the feminist revaluation of sport as an aspect of "power to", power to affirm women's integrity, power to co-operate, power to have fun. Moreover, if women can remake sport, despite their "learned disability",²⁵⁸ then why can they not also remake difference, to disconnect it from its negative and subordinating manifestations to be a component in a radically transformative counterparadigm for social interaction. Furthermore, there is nothing in MacKinnon's desiderata of autonomy, integrity, self-worth or self-determination that is necessarily anti-thetical to the ethic of care, for, as I have emphasized, the ethic of care is not self-sacrifice.²⁵⁹ On the contrary, as Jean Grimshaw points out, it is exactly these sorts of qualities that make "care and an understanding of others" effective, powerful.²⁶⁰

c) *Reconciling MacKinnon and Gilligan*

Within the interdependence of mutual (non-dominant) differences lies that security which enables us to descend into the chaos of knowledge and return with true visions of our future, along with the concomitant power to effect those changes which can bring that future into being. Difference is that raw and powerful connection from which our personal power is forged.

Audre Lorde²⁶¹

A careful reading of MacKinnon provides an opportunity to question just how wide the gap is between her viewpoint and that of Gilligan. Although she clearly favours the equalitarian position on the continuum of equality and difference,²⁶² at other moments, more interstitially and less developed, she does suggest that women's value structures would be, and are even now, somewhat different from those of men. The discussion of sport is the clearest example.

258. *Feminism Unmodified* at 120.

259. It may also be worth noting that "self-determination, autonomy, integrity and self-worth" are notoriously nebulous terms, and may not take us far beyond "equality" in the quest for specificity. Moreover, MacKinnon does not tell us in what way these virtues have necessarily avoided the power-hierarchy thesis that determines her work. For example, surely all women politicians would claim that their careers, achievements and agendas are premised upon self-determination, autonomy, dignity and self-worth, but one wonders if MacKinnon would agree that they have avoided patriarchal hegemony?

260. Jean Grimshaw, *Feminist Philosophers* 183 (1986).

261. *Sister Outsider* at 111-112.

262. See *infra*.

MacKinnon's point of disagreement with Gilligan is that the latter identifies difference with gender. But this, perhaps, is a misunderstanding of Gilligan's thesis, which, as I have indicated, is explicit in its rejection not only of biological determinism, but also of the identification of gender with difference. Indeed, recognizing that the debate may be somewhat misplaced, and by shifting focus from the source or form of difference to its substance, we can see that there may be more common ground between MacKinnon and Gilligan than has hitherto been recognized. Indeed, at one point MacKinnon refers to the values articulated by Gilligan that contribute in the ethic of care:

That does not mean that I throw out those values. Those are nice values; everyone should have them. I am not saying that taking these values seriously would not transform discourse, which would be a good thing under any circumstance of gender.²⁶³

MacKinnon not only accepts the desirability of such values, but also their potentially transformative potential. Her criticism is that such values are identified with women.²⁶⁴ Gilligan rejects such a reductionism, and says more modestly that some women and some men share both value structures, although not necessarily in equal amounts. My suggestion is that both men and women can contribute to the ethic of care, that we should deprivitize it, and that we ought to consider it a legitimate concern for legal practice and theory.

Having taken the detour through difference, we can begin to work towards an alternative political-moral discourse and practice based upon an ethic of care. Difference may provide a conceptual vantage point that can help us move towards an alternative social structure.²⁶⁵

263. Discourse at 74-75.

264. Discourse at 74-75.

265. Moreover, difference if taken seriously, can allow for a dramatic expansion of autonomy, dignity and empowerment. As Audre Lorde suggests,

Difference must not be merely tolerated, but seen as a fund of necessary polarities between which our creativity can spark like a dialectic,

Sister Outsider, 111 (1986).

As I have suggested, MacKinnon's proposition that the dominant ideology of masculinism is a consistent and unified whole is unidimensional. It inhibits her from identifying the nuances, gaps and exceptions to the dominant ideology. Difference is one such nuance or exception in the matrix of patriarchy. However if difference is understood in the biologicistic or essentialist manner, as sex determined, then difference itself accepts patriarchal dualisms. Difference can be developed as a counterprinciple to the formalistic reductionism of equalitarianism that assumes the white, middle-class male to be "the measure of all things", (*Feminism Unmodified* at 34).

If difference is understood in its existential, multi-faceted heterogeneity then the nuances and exceptions become the normal, the expected *and* the accepted. Difference is then recognized to relate not only to gender, but also to race, class, sexual orientation, physical or mental abilities, age, etc.

d) *Alternative locations for the ethic of care*

What is at stake in this transcendence is the negation of the exploiting and repressive values of patriarchal civilization. What is at stake is the negation of the values engendered and reproduced in a society of male domination. And such radical subversion of values can never be the mere by product of new social institutions. It must have its roots in the men and women who built the new institutions.

Herbert Marcuse²⁶⁶

As we have seen, the real problem for MacKinnon is not the ideal of the ethic of care, but rather her concern that difference is reduced to women. Gilligan's work has been heavily criticized for its dangerous propensity to reproduce and legitimize traditional masculinist stereotypes of femininity with its correlative passification and disempowerment of women. However, now that we have a stronger conception of what difference might mean, a substantive vision rather than the insubstantial invocation of otherness, an ideological transvaluation, it may be possible to trace elements of the ethic of care elsewhere than in women's biology or socially constructed roles. This article does not collapse a political-moral discourse into the biological, for that would be to reproduce patriarchy's propensity for stereotypical and repressive rolification.

In recent years, an increasing number of male scholars in a variety of disciplines have also been tentatively moving towards the orbit of an ethic of care. For example, in the field of psychology, Joseph Pleck has

The espousal of difference confronts, head on, the oppression of a value-structure that espouses an equality which demands that those who are different become different from that which they are if they wish to be successful. In order that they be socially recognized and valued, it demands the very negation of that which makes them who and what they are. It assumes the legitimacy of structure which is systematically weighted in favour of a particular community by portraying it is "neutral", "necessary" or "natural" and insisting that people change — deny themselves — to fit, reinforce and ultimately perpetuate the structure. Thus, the community is constructed to fit the elite benefitting structure, rather than the social structure being transformed to facilitate, encourage and empower the plurality of diverse communities that characterize our societies.

In this light, Canada may have a potentially significant advantage over the United States in that Canadians recognize cultural plurality as both desirable and worthy of state support. With regards to ethnicity, Canada encourages the vision of a society as a cultural mosaic, whereas the United States prefers the melting pot. Of course, Canada is still governed by w.a.s.p. oriented persons but the potential is there for alternative developments. Of particular interest here are both the entrenchment of the multicultural provisions in s. 27 *Canadian Charter of Rights and Freedoms*, (Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11) and Canada's history of red toryism.

See also Minow, "Justice Engendered", *supra* note 135; Scales, "Feminist Jurisprudence" *supra* note 179 at 1376, 1387-1388; I.M. Young, "Humanism, Gynocentrism and Feminist Politics" (1985), 8 *Women's Studies Int. Forum* 173, 180-181, and "Difference and Polity: Some Reflections in the Context of the New Social Movements" (1987), 56 *Cincinnati L.Rev.* 535.

266. *Marxism and Feminism* (1974), 2 *Women's Studies* 274-288.

been unpacking *The Myth of Masculinity* (1981). In philosophy, Michael Ignatieff has urged us to respond to the *Needs of Strangers* while Larry Blum encouraged us to pursue *Friendship, Altruism and Morality* (1980). Michael Kaufmann has recently edited a collection of essays entitled *Beyond Patriarchy* (1986) which, despite some serious problems, also takes important steps towards an ethic of care.²⁶⁷ Or, looking back a century we may remember botanist, biologist, anarchist and social theorist, Kropotkin, who challenged Darwin's vision of "survival of the fittest" with an impressive account of evolution premised upon a vision of *Mutual Aid*.²⁶⁸

Perhaps the most important jurisprudential effort to move towards an ethic of care, yet developed by a male, is that of Roberto Mangabeira Unger in his essay on human personality, *Passion* (1984). Although Unger fails to discuss the issue of gender or difference explicitly in his essay, in my opinion, there is much in *Passion* that correlates with Gilligan's work.²⁶⁹ Moreover, his theory of human personality provides access to another pervasive and, I would suggest, inspirational aspect of his work, "Solidarity", which he characterizes as "love struggling to move beyond the circle of intimacy".²⁷⁰ When he expands upon solidarity the parallels with Gilligan are palpable, energizing, and encouraging:

The kernel of solidarity is our feeling of responsibility for those whose lives touch in some way upon our own and our greater or lesser willingness to share in their fate. Solidarity is the social face of love: it is concern with another as a person rather than just respect for him (sic) as a bearer of formally equal rights and duties or admiration for his (sic) gifts and achievements.²⁷¹

Solidarity, I suggest, is a cognate of the ethic of care.

If we turn our attention to alternative cultures, we realize that anthropologists have consistently identified elements of the ethic of care

267. See also Milner S. Ball, *Lying Down Together* (1985) who pursues a non-violent, "peaceable kingdom" premised upon theology; G. Frug, Book Review, *The Language of Power* (1984), 84 Columbia L.Rev. 1881. Moreover, even important historical figures such as Thomas Paine envisioned a potential America, premised upon themes that are connected with a polity motivated by love and friendship rather than greed, commerce and interest group factionalism. See Norman Jacobson, "Political Science and Political Education" (1963), 57 Am. Pol. Sc. Rev. 561.

268. Gloria Steinem reminds us that, "some male primates carry and generally 'mother' their infants, male lions care for their young . . . and male penguins literally do everything except give birth, from hatching the eggs to sacrificing their own membranes to feed the new arrivals" in "Erotica v. Pornography" in *Outrageous Acts and Everyday Rebellions* 219, 226 (1983).

269. See, Devlin, Book Review (1986), 11 Queen's L.J. 219.

270. *Law in Modern Society* 207 (1975).

271. *Ibid.*, 206. For a homologous feminist jurisprudential effort to reclaim love for feminist transformation see Ruth Colker, "Consciousness and Love: Towards a Feminist Theological Dialogue" (unpublished manuscript, 1988).

in pre-industrial societies. Social anthropologist Colin Turnball, for example, opines that if we value a "conscious dedication to human relationships affective and effective, the primitive is ahead of us all the way."²⁷² Margaret Mead claimed that the Arapesh Tribe of the South Seas is a society in which both the males and females pursue lives that are peaceful and co-operative, and where males play an important role in child care.²⁷³

Even within our own Euro-yanqui societies, there may be traces of the ethic of care, at least intracommunally, especially among those who have been marginalized and subordinated by mainstream society.²⁷⁴ For example, the extremely poor of Appalachia are characterized by "a person oriented behaviour accompanied by an ideology of levelling".²⁷⁵ There are indications that "Eskimo", Chicano and Indian children are critical of the dominant culture's lack of care for others and for the earth.²⁷⁶ Indeed, North American native people in general appear to manifest similar viewpoints.²⁷⁷ Moreover, scholars who have concentrated their research on black culture have highlighted traits that also dovetail in important ways with the ethic of care.²⁷⁸ Even game theorists have tentatively identified a connection between an "exploitative" masculine strategy and feminine "accommodative" strategy and the cultural background of the male players.²⁷⁹

272. *The Human Cycle* 21-22 (1983). Primitive is Turnball's word, our language once again demonstrating its value laden nature.

273. *Male and Female*, 76 et seq (1968). She also discusses the Murdagumor in which women are aggressive, belligerent and resistant to pregnancy and nursing. *Ibid.*, Huntington Cairns also draws our attention to other communities which have a high level of social integration and yet lack a coercive state of the kind demanded by Locke's imperative to escape from the state of nature. *Legal Philosophy from Plato to Hegel* 348 (1967).

274. It is possible to argue that in the light of these suggestions care should be understood as a correlative of conditions of subordination and inequality, and therefore it is undesirable to encourage it. I am reluctant to accept such a proposition for that would be to buy into the dominant culture which too quickly prioritizes the self over the other. I think it is more beneficial to see care in a positive light, as an alternative vision, in spite of oppression, rather than because of it.

275. Robert Denhardt, cited in Ferguson, *supra* note 43, at 23.

276. Robert Coles, *Eskimos, Chicanos, Indians* (1977) cited in Tronto, "Beyond Gender Difference To a Theory of Care" (1987), 12 Signs 644, 649-51. "Eskimo" is Coles' term, not mine.

277. See for example, Menno Boldt, *The Quest for Justice* (1986) and Patricia Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Ya-Gah" (1986), 2 C.J.W.L. 159.

278. See for example Carol Stack, *All Our Kin* (1976); Betty Lou Valentine, *Hustling and Other Hand Work: Lifestyles in the Ghetto* (1978); J.L. Gwaltney, *Drylongso: A Self Portrait of Black America* (1980); G.G. Jackson, *Black Psychology: An Avenue to the Study of Afro-Americans* (1982), 12 Journal of Black Studies 241; W.W. Nobles, "Extended Self: Rethinking the so-called Negro self-concept" (1976), 2 Journal of Black Psychology 15.

279. T.K. Uesugi and W.E. Vinaki, "Strategy in a Feminine Game" (1963), 26 Sociometry 75. See further, K. Ferguson, *supra* note 43 at 164.

So, perhaps the ethic of care may not be as rare as we have come to believe. Not only are there indications that people of both sexes experience care in their own lives, there are indications that it is already a constitutive, though not necessarily dominant, element in contemporary and alterior social relations, both public and private. Can we expand it?

What I am suggesting is that the dominant ideology of separation and otherness, domination and subordination, sameness and difference, normal and deviant, male and female is only a partially accurate comprehension of the complexity of life and social interaction. It is a deeply structured paradigm that moulds our understandings, criticisms, and visions, but it is a paradigm nonetheless, and therefore, simplistic and repressive. It only functions in so far as it can achieve coherence, but the price of such coherence is the repression of deviations, exclusions, exceptions. However, as Kuhn points out, paradigms change, and they change because the repression of the deviations can no longer be effective.²⁸⁰ The ethic of care, I suggest, is one such deviation, it exists, it is real and it may even be in the ascendancy as an “insurrection(al) subjugated knowledge”,²⁸¹ creating a “crisis” for the dominant ideology. Feminism is at the forefront of this crisis-inducing dynamic. Feminism’s transformative vision highlights the descriptive and normative inadequacies of the dominant ideology and provides us with a very real political opportunity to bring about a paradigm-shift, to de-centre and de-range patriarchy and violence, and to move us closer to a solidarity inspired society, to a society that can resist what for patriarchy has been a thanatical, and increasingly eschatological, imperative. This discussion of the ethic of care allows us to begin to soften the boundaries between masculine and feminine, to access the “other” in each one of us²⁸² and to allow us to remake both our interpersonal and politico-juridical lives.

280. *The Structure of Scientific Revolutions* (2nd ed. 1970).

281. Foucault, *Power/Knowledge*, 81 (1972).

282. D. Cornell and A. Thurschwell, “Feminism, Negativity and Intersubjectivity” (1986), 5 *Praxis International* 486, 447. I cannot emphasize this point strongly enough. My support for the ethic of care is not premised upon a universalistic premise that all women, regardless of historical, class or ethnic differences have this talent because of their nurturant or maternal opportunities/abilities. See for example Sara Ruddick, “Maternal Thinking” (1980), 6 *Feminist Studies* 342. The connection between care and female is contingent, historical and cultural. Care cannot be reduced to maternalism. Both sexes have this capacity, it is part of our human potential. As Jane Flax suggests, “our similarities are even more striking if we compare humans to (say) toads or trees” in “Postmodernism and Gender Relations in Feminist Theory” (1987), 12 *Signs* 621, 636. Feminism is important not only for its concern for women’s needs but also for its radical rejection of mankind’s dangerous and damaging propensities and espousal of a more caring social ethos, a perspective that is shared by at least some men.

To conjecture further, perhaps one of the reasons why we have such difficulties in recognizing this attribute is because of our training as lawyers, a vocation that is, at once, underpinned and overdetermined by visions of individualism, and an excessive orientation

e) *Beyond Either/Or*

As the oppressed, fighting to be human, take away the oppressors' power to dominate and suppress, they restore to the oppressors the humanity they had lost in the exercise of oppression.

Paulo Friere²⁸³

I hope that it is clear from the foregoing analysis of the two traditions — equalitarianism and gynocentrism — that alone each is inadequate, incapable of providing grounding, support and direction which a progressive feminism requires. Equalitarianism may either overemphasize autonomy and individualism thereby foregoing the importance of human interdependence and the necessity for empathy, or it may challenge masculinist hegemony on only a superficial level, thereby leaving too much of the patriarchal substructure in place. On the other hand, gynocentrism, unless reinforced by equality, may run the risk of either reproducing and capitulating to the traditional repressive stereotypes or of denying the important needs of an individual self. But, as Jean Grimshaw asks, "Why should autonomy not be compatible with a rejection of domination and aggression, with a recognition of human interdependence, and for the need for care of others?"²⁸⁴

There is no *a priori* reason why these two perspectives have to be considered disjunctively or as contradictory. Methodologically, feminists have begun to argue that either/or conceptions reflect a masculinist propensity to conceptualize in authoritarian, separatist and absolutist terms,²⁸⁵ thereby ignoring more holistic, complex and web-like patterns of interdependence. Malist epistemology espouses grand, purist principles resulting in "alienating dichotomies"²⁸⁶ while a feminist epistemology emphasises contextualism, and the plurality of techniques. For feminism, conjunction rather than disjunction, a transcendence of the apparent contradiction, is the better way to go.

towards individual rights consciousness. Perhaps if we looked beyond our own discipline, and listened to what others have suggested we might begin to see otherwise, and pay attention to the ethic of care. We must be extremely careful not to falsely universalize our own experiences so as to ignore alternative experiences, understandings and possibilities.

283. *Pedagogy of the Oppressed* (1970), cited in Miles & Finn, *supra* note 14 at p. 304.

284. *Feminist Philosophers* 47 (1986).

285. Charlotte Bunch, "Beyond Either/Or: Feminist Options" (1976), 3 *Quest* 3. Marilyn French, *Beyond Power*, 500-504 (1985).

286. A. Miles, I.F.P., *supra* note 21 *passim*. For a sustained critical feminist critique of dichotomous thinking, see Fran Olsen "Family and Market", *supra* note 8 and "Sex of Laws", (unpublished manuscript 1984). For feminist criticism of dichotomous thinking that has negatively impacted upon the legal and cultural status of women, see Katherine O'Donovan, *Sexual Divisions in Law* (1985); A. Bottomley, S. Gibson, B. Meteyard, "Dworkin, Which Dworkin? Taking Feminism Seriously" (1987), 14 *J. of Law and Soc.* 47.

Therefore, although equalitarianism and gynocentrism tend to stretch the feminist cloth in different directions, that does not mean that there must be two mutually exclusive “cuttings” . . . the feminist texture is malleable. In the same way as the woof and the warp run in competing directions, when the two are interconnected through weaving we are left with a fabric that is significantly more substantial than the sum of its parts. Moreover, when further different multicoloured threads are added the result may be “a tapestry of rich and royal hue”.²⁸⁷ Equality, I suggest, is essential but not adequate, and may be complemented by a politico-moral vision premised on the ethic of care. The weave may produce a cloth with the texture of a “rainbow coalition”.²⁸⁸

There are, I think, several different ways in which feminists can begin to weave equalitarianism and difference together in support of the aspiration to develop a radical transgressive practice. The first two suggestions are a little more abstract while the third is somewhat more pragmatic and already underway.

The first proposition comes from the work of Adrienne Rich in her essay, “Compulsory Heterosexuality and Lesbian Existence”.²⁸⁹ In an effort to challenge the taken for granted nature of heterosexuality, with its correlative marginalization and suppression of lesbianism, Rich seeks to highlight and expand the significance of lesbianism, both historically and experientially. In support of this project, she develops the concept of a “lesbian continuum” to explain a wide range of:

woman-identified experience; not simply the fact that a woman has had or consciously desired genital sexual experience with another woman. [Instead we should] expand it to embrace many more forms of primary intensity between and among women, including the sharing of a rich inner life, the bonding against male tyranny, the giving and receiving of practical and political support; if we can also hear in it such associations as *marriage resistance* . . . we begin to grasp breadths of female history and psychology which have lain out of reach as a consequence of limited, mostly clinical definitions of ‘lesbianism’.²⁹⁰

Such an expansive conception of lesbianism is important for two reasons. First, as the reference to “clinical definitions” makes clear, lesbianism is not innate, it is socially constructed categorization, usually pejorative.

287. Carole King, *Tapestry*.

288. Iris Marion Young describes the “rainbow coalition” as “an idea of political public which goes beyond the ideal of civic friendship in which persons unite for a common purpose and mutual respect. While it includes commitment to equality and mutual respect among participants, the idea of the rainbow coalition preserves and institutionalizes in its form of organizational discussion the heterogeneous groups that make it up”. See also Fran Olsen’s discussion of “rainbows”, *supra* note 8 at 1578.

289. (1980), 5 signs 631.

290. *Ibid.*, at 648-49.

More important, however, is the subversive aspect of the continuum: its ability to undermine the traditional, exclusive dichotomy of heterosexual *or* lesbian. The idea of a lesbian continuum opens up the larger *possibility* — and that is all it is — of escaping polarizing dualities that necessitate either/or choices, to move towards a desired goal by holding on to both ends of the chain at the same time. Interpreted in this light, equalitarianism and difference can be understood as alternative locations on a continuum, potentially reinforcing and mutually interdependent perspectives, in pursuit of the same goal, the transcendence of women's subordination.

Of course, the idea of a continuum does not resolve the tension between those who prefer equalitarianism and those who advocate difference, but it does indicate that these are alternative emphases in the pursuit of the same dynamic, and it helps to keep the conversation going in times of stress. As a methodological contribution the continuum can be of strategic importance in maintaining feminist solidarity.

The second proposition is inspired by the legal and social theorist, Roberto Mangabeira Unger. Unger posits that every radical social movement must, in its attempt to move from "here" to "there", develop the fertile terrain between reform and revolution. In his manifesto for socio-legal reconstruction he proposes that such movements must develop a dynamic fusion of internal development and visionary imagination.²⁹¹ Put differently, there must be a capacity to work from within, to deviate, expand and remake the familiar and normal into the novel and transcendent, while being simultaneously informed, guided and inspired by a transformative vision. This symbiosis allows a progressive movement to eclipse the false dichotomy of fruitless reform and utopian aspirationalism.

These two movements currently co-exist in the feminist movement. On the one side there exists the potential to internally develop and expand liberalism's "commitment" to equality, to remake equality into a substantive reality. On the other side, there is the transformative vision of difference, a potential value structure that challenges the hegemony of masculinist liberalism both in the realm of socio-political institutions and also in the dynamic of social interaction, and even human identity.

Unger's proposal enables feminism to maintain both perspectives, practices and visions. It encourages us to understand feminism as maintaining both equality and difference in a simultaneous, transgressive dynamic, mutually reinforcing rather than exclusively dichotomous or antithetical.

291. *The Critical Legal Studies Movement* (1986).

The third inspirational source that can enable feminism to transcend a debilitating struggle is the work of Canadian feminist, activist and scholar, Angela Miles, who has already attempted the weaving process. Through her “integrative feminine principle” she has attempted to knit together both equality and difference into a mutually enriching, complex, politically sensitive and sophisticated feminist strategy that will minimize the dangers of exclusive reliance on either one or the other.²⁹² Proactively, Miles claims that such a “synthesizing vision of politics” allows feminism to challenge the hegemony of androcentric conceptions of humanity and social interaction.

The integrative feminine principle . . . reject(s) . . . all the dichotomies of industrial society that shape and limit people’s existence. It asserts that men and women are of the same nature but, unlike reformist feminism and early feminist radicalism, it does not do this by insisting that women are just like (as good as) men. Instead it recognizes that although men and women ultimately share the same human existence, in the process of civilization certain human characteristics, capabilities and activities have been labelled feminine and their practice has largely been restricted to women and the female sphere of reproduction and personal relations.²⁹³

Fully aware that this social construction of gender has resulted in the inferiorization and oppression of women²⁹⁴ she continues:

The integrative feminine principle provides a value framework and an alternative rationality for feminist radicals’ political struggle in that it consciously posits an alternative definition of human nature which is broad enough to include, and value equally, characteristics now seen as, and generally in fact distributed between, male and female.²⁹⁵

Thus, within Miles’ formulation, the conjunction of equality and difference provides the vital starting point for the reconstruction of social interaction, by espousing the reinvigoration of values that correlate with the ethic of care.

III. *Pornography*

1) *Introduction*

The issue of pornography both energises and paralyses feminism. It energises in that it provides a concrete angle through which feminists can highlight the pervasiveness and the patterns of inequality, subordination

292. K. Lahey attempts to develop aspects of Miles project to facilitate a feminist approach to reconstruct tax law with respect to women. “Equality and Specificity” *supra* note 9.

293. Miles, I.F.P. *supra* note 21 at 485-486. See also Fran Olsen on a rejection of socially constructed dichotomies, *supra* note 8.

294. Miles, I.F.P. *supra* note 21 at 486.

295. *Ibid.*, Feminists are also acutely conscious of the dangers that could be superimposed on their “difference claim” by conservatives such as Phyllis Schlafly.

and misogyny in contemporary society. The feminist analysis of the pornographic flood provides a unique opportunity to connect experience, structure and critique. However, this moment of strength is also a possible moment of weakness in that the question of legal regulation has split feminism resulting in debates that have, on occasion, been acrimonious and visceral.²⁹⁶ The question that I wish to raise is a little more wide ranging than most of the discussions to date. My concern is whether the recent impulse by many feminists to seek a solution, in whole or in part, to the very real problem of pornography by recourse to legal remedies²⁹⁷ undermines feminism's transformative vision of an egalitarian, non-hierarchical, non-alienating society. Rephrased, does the legal regulation of pornography fit with the ethic of care, and the injunction not to hurt others?

The decision to discuss feminism and pornography is deliberate and immediate. All too often scholarship functions in the realm of the abstract, toying with conceptual models and utopian visions that lack any solid grounding in the reality of most peoples' existence.²⁹⁸ By introducing the pornography question, we are forced to face up to questions such as: what is the impact of such material on women's lives; is there a possibility of women's objections even being heard, never mind being acted upon; how should pressure groups, and society as a whole, deal with such issues; can legal remedies be developed to deal with such a problem; what are the internal legal barriers to such strategies; are legal remedies, in themselves, appropriate? These are highly *political* and urgent issues which need to be dealt with. Scholarship which discusses feminism, feminist jurisprudence, law and pornography is committed scholarship, engaged scholarship, political scholarship.²⁹⁹ It rejects the pseudo-scientific objectivity which most legal scholarship claims for itself by making it clear that legal discourse is political discourse; that what we are involved in is in no way distinct from politics, but integral to it.³⁰⁰ Normative questions are the very life blood of law, particularly when law is understood through the prism/speculum of gender.³⁰¹

296. See for example, Catharine MacKinnon, "Standards of Sisterhood" (1985), 7(3) *Broadside*; *Letters to the Editor*, (1986) 7(4) *Broadside* 297.

297. For a useful, brief review of some of the various viewpoints of women on pornography and the question of legal regulation, see K. Lahey "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-85), 20 *New Eng. L.Rev.* 649, 649-51. See also E. Spahn, "Sex and Violence" *ibid.*, at 629, 630.

298. For a discussion of why it is important for feminism to reject abstraction and concentrate upon contextualism, see Carol Gould, "The Woman Question Philosophy of Liberation and the Liberation of Philosophy" (C. Gould and M. Wartofsky eds. 1976) *Women and Philosophy*.

299. See MacKinnon, *Feminism Unmodified* at 1.

300. Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (1986); *Politics* (1987).

301. This paper is not concerned with what I consider to be a second level issue of the

2) *A Feminist Critique of Pornography*

Traditionally, the story of pornography has been overdetermined by the

constitutionality of anti-pornography legislation, or recent common law developments such as *R. v. Wagner* (1985), 43 C.R. (3d) 319, 37 Alta. L.Rev. (2d) 301 (Q.B.). The politically and logically prior question for feminists — but not for legal fetishists — is whether legal remedies are the most fruitful path to follow. I believe that the constitutional argument can be persuasively argued both ways. It is political predispositions that tilt the balance.

Those who view anti-pornography legislation as constitutionally valid include:

K. Lahey, "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-85), 20 New England L.Rev. 649.

Lahey, "The Charter and Pornography: Toward a Restricted Theory of Constitutionally Protected Expression", in *Litigating the Values of a Nation* 265 (J. Weiler and R. Elliot eds. 1986).

Michael Gershell, "Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Really Mattered" (1985), 11 Wm. Mitchell L.Rev. 41.

Cass Sunstein, "Pornography and the First Amendment" (1986), Duke L.J. 589.

Catharine A. MacKinnon, "Not a Moral Issue" (1984), 2 Yale Law and Policy Rev. 321 [hereinafter cited as "Not Moral"]; "Pornography, Civil Rights and Speech" (1985), 20 Har. C.R.C.L.Rev. 1 [hereinafter cited as "Speech"].

Some of those who would disagree include:

Randall D.B. Tigue, "Civil Rights and Censorship — Incompatible Bedfellows" (1985), 11 Wm. Mitchell L.Rev. 81.

Louise Arbour, "The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression", *Litigating the Values of a Nation*, *ibid* at 294.

James R. Branit, "Reconciling Free Speech and Equality: What Justifies Censorship?" (1986), 9 Harvard Journal Law & Public Policy, 429.

Geoffrey R. Stone, "Anti-Pornography Legislation or Viewpoint Discrimination" (1986), 9 Harvard Journal Law & Public Policy 461.

T. Emerson, "'Pornography and the First Amendment' A Reply to Professor MacKinnon" (1984), 3 Yale Law and Policy Review 130.

A. Alan Borovoy, "Freedom of Expression: Some Recurring Impediments", in *Justice Beyond Orwell* 125 (R. Abella & M. Rothman eds. 1985).

Robin Elliott, "Freedom of Expression and Pornography: The Need for a Structured Approach to Charter Analysis", in *Litigating the Values of a Nation*, *ibid* at 308 — sits on the surface, non-committal, but overall tone suggests he favours expression.

Barry W. Lynn, "Civil Rights' Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation" (1986), 21 Harv. C.R.C.L.L.Rev. 27.

Alan Dershowitz, "Women's War on Porn", *Time*, August 27th, 1979 at 64.

There are a couple of comments that I would like to make on the strategic significance of constitutionalization of the pornography issue. First, feminist advocates of legal controls on pornography or remedies against pornography must have contemplated the very high likelihood that this would become a constitutional issue. As feminists have pointed out time and again, law is a male-constructed and dominated episteme, discourse and practice, therefore it was predictable that the constitutional twist would occur.

The second issue raised by recourse to law, is the danger of distraction. What started off for feminism as an issue of powerlessness has, through the hegemonic dynamic of legal discourse, been recorded as an issue of constitutionally protected speech, and the correlative miasmic morass of doctrinal arguments that accompany such an encoding. What we find is what Robert Samek has described as metaphenomenalism, a perennial shifting of the locus of the problem, a continual slide to the peripheral. Robert Samek, *The Metaphenomenon* (1981). Not only is this encoding process a distraction, it is also insidious that it is liberal legalism, not feminism, which has a powerful hold over the popular psyche and the appeal to constitutional rights allows the liberals to portray progressive feminism in a negative light . . . casting them as totalitarian despots. The constitutional twist, therefore, automatically puts the feminist challenge to pornography in a position of politico-ideological disadvantage.

concept of "obscenity"³⁰² resulting in a conceptualization and discourse in terms of conservatism versus liberalism,³⁰³ "Victorian priggishness" versus sexual liberation, intolerance versus prurience.³⁰⁴ Thus, until recently, pornography has been understood as morality play³⁰⁵ rather than an act of political power, phallic power.³⁰⁶

302. See for example, Clor, *Obscenity and Public Morality* (1975); Oybikowski, "Law, Liberty and Obscenity" (1972), 7 U.B.C.L.Rev. 38; Hunter, "Obscenity, Pornography and Law Reform" (1975-76), 2 Dal. L.J. 482; *Pornography and Censorship* (D. Copp and S. Wendell eds. 1983); Joel Feinberg, "Pornography and the Criminal Law" (1979), 40 U. Pitt. L.Rev. 567; F. Schauer, *The Law of Obscenity* (1976); D.A.J. Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" (1974-75), 123 U. Pa. L.Rev. 45 and *The Moral Criticism of Law*, 56-77 (1977); Alan Young, "News From the Front — The War on Obscenity and the Death of Doctrinal Purity" (forthcoming, Osgoode Hall L.J.).

303. United States Commission on Obscenity and Pornography (1971); E. Hoffman, "Feminism, Pornography and Law" (1985-86), 133 U. Pa. L.Rev. 497, 504-510; Amitai Etzioni, "Porn is here to stay", New York Times, May 17, 1977 at 35; Paul Goodman, *Utopian Essays & Practical Proposals* 57 (1962); Kathleen E. Mahoney, "Obscenity, Morals and The Law: Challenging Basic Assumptions" in *Justice Beyond Orwell*, *supra* note 301, at 77. Some observers suggest that anti-pornography feminists, although adopting a different approach, have entered into an alliance with conservatives. See for example, Donald Downs, "The Attorney General's Commission and the New Politics of Pornography" (1987), 4 A.B.F.R.J. 641; Robin West, "The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report" (1987), 4 A.B.F.R.J. 681; Varda Burstyn, *Women Against Censorship* (1985).

304. Schipper, "Filthy Lucre, A Tour of America's Most Profitable Frontier", Mother Jones 31, April 1980; Margaret Baldwin, "The Sexuality of Inequality" (1984), 2 Law and Inequality 629.

305. See, *Roth v. U.S.* 354 U.S. 476 (1957); *Miller v. California* 413 U.S. 15 (1973); see C. Jacobs, "Patterns of Violence" (1984), 7 Harvard Women's L.Rev. 5, 29-36. Canada for a long time has followed the English decision of *R. v. Hicklin* (1868), 3 Q.B. 359, 18 L.T. 395; and *Brodie v. The Queen*, [1902] S.C.R. 681, 32 D.L.Rev. (2d) 507. See also Joel Bakan, "Pornography, Law and Moral Theory" (1985), 17 Ottawa L.Rev. 1.

Nor should we be confident that this dominant interpretation has now passed. For example, although the U.S. *Attorney-General's Commission on Pornography Final Report*, July 1986, does refer to more recent interpretations of pornography, including that espoused by feminists, its overall tone is still staunchly moralistic. Moreover, moralism pervades a recent Canadian proposal to criminalize pornography which it defines as:

any visual showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or *other sexual activity*. (emphasis added)

Bill C-114, An Act to Amend the Criminal Code and Customs Act, 1st Session, 33rd Parl., 1984-85-86, cl.7. After extensive criticism, this proposal has been withdrawn to be replaced with a somewhat more specific definition. See Bill C-54, An Act to Amend the Criminal Code, 2nd Session, 33rd Parl., 1986-87, s. 1. But this too seems to have lapsed.

Again moralism appears to be on the ascendancy in the U.S. Supreme Court in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) which upheld the constitutional validity of state sodomy prohibitions, and the rhetoric of Judaeo-Christian morality. Similarly there is a subtle mixture of moralistic discourse and feminism in the S.C.C. decision in *Towne Cinema Theatres v. R.*, [1985] 1 S.C.R. 494, [1985] 4 W.R.R. 1, 37 Alta. L.Rev. (2d) 289, 45 C.R. (3d) 1; 18 D.L.Rev. (4th) 1.

306. Catharine A. MacKinnon, "Not Moral", *supra* note 301 at 321; Beverly Brown, "A Feminist Interest in Pornography — Some Modest Proposals" (1981), 5/6 M/F 5.

In recent years, feminists have retold the story and but now we see pornography as vicious, chilling, horrifying. Pornography has been disconnected from obscenity, and the restraining conceptual hegemony of the moralistic see-saw has been overturned. By articulating the integral connection between gender and power, feminism has gone a long way in providing a deeper understanding of the nature and effects of the pornographic phenomenon.³⁰⁷ It has named³⁰⁸ pornography for what it is: a vital constitutive component in the continued existence of the ideology and practice of male supremacism. The sexual revolution of the 'sixties and 'seventies was not a woman's revolution,³⁰⁹ and therapeutic de-repression has become domination. In short pornography is an exemplary moment of patriarchy.³¹⁰

As I have already indicated there are many different feminist perspectives, and these varying viewpoints have concretized themselves in relation to the pornography debate. What follows is an outline of the most critical feminist approach to pornography, one that sees pornography as having no redeeming qualities from a feminist perspective. Frequently, this is perceived as "the radical feminist" critique of pornography.

However, pornography is part of a broader debate within feminism, what has been called "The feminist sexuality debate". See e.g., (1984-85), 10 *Signs* 102-135; C. Cohen, "The Feminist Sexuality Debate: Ethics and Politics" (1986), 2 *Hypatia* 71. Other feminists who claim to be just as radical as the anti-pornography feminists, argue that pornography is not monolithically oppressive, that some women find some pornography to be liberating, and transformative. See in particular, *Pleasure and Danger: Exploring Female Sexuality* (C. Vance ed. 1984); *Powers of Desire*, (Ann Snitow et al. eds. 1983); Robin West, "The Feminist Conservative Anti-Pornography Alliance" (1987), 4 *A.B.F.R.J.* 681; Paula Webster, "Pornography and Pleasure" (1981), 3 *Heresies* 48. See also Alan Soble, *Pornography: Marxism, Feminism and the Future of Sexuality* (1986) for a Marxist defence of pornography, that envisions a positive role for pornography in a non-alienated society, pornography as a contribution "to the rich, sensual, sexual lives of communist people" at 108.

307. See for example, Irene Diamond, "Pornography and Repression: A Reconsideration" (1980), 5 *Signs* 686; A. Dworkin, "Against the Male Flood" (1985), 8 *Harvard Women's Law Journal* 1, *Women Hating* 78 (1976); *Pornography: Men Pressing Women* (1981); S. Griffin, *Pornography and Silence* (1981); *Take Back the Night: Women and Pornography* (L. Lederer ed. 1980); Catharine A. MacKinnon, "Not Moral", *supra* note 301,

Obscenity law is concerned with morality, specifically morals from the male point of view, meaning the standpoint of male dominance. The feminist critique of pornography is a politics, specifically politics from women's point of view, meaning the standpoint of the subordination of women to men. Morality here means good and evil; politics means power and powerlessness. Obscenity is a moral idea; pornography is a political practice. Obscenity is abstract; pornography is concrete (at 322-323).

See also *Feminism Unmodified*, Part III, "Pornography".

Susan Cole, "Gagged, Bound and Silenced: Confronting Pornography" (1981), 10 *Broadside* 11; Anne Cameron, "Hardcore Horror", *Broadside* (Feb. 1983); Geraldine Finn, "Against Sexual Imagery: Alternative or Otherwise" (1986), 12 *Parallelogramme*.

308. For a discussion of the power of "naming" see Mary O'Brien, "Feminism and Revolution" in *Feminism in Canada*, *supra* note 14 at 251, 259; Scales *supra* note 179 at 1383, footnote 59; Dworkin, "Male Flood" *supra* note 307 at 9.

309. Diamond *supra* note 307 at 701; MacKinnon, *Feminism Unmodified* at 144, Snitow et al. *supra* note 306 at 12. See *contra* B. Ehrenreich, E. Hess, G. Jacobs, *Remaking Love: The Feminization of Sex* (1986).

310. MacKinnon goes so far as to posit that, "In a feminist perspective, pornography is the essence of a sexual order, its quintessential social act". "Not Moral", *supra* note 301 at 335;

A radical feminist interpretation of pornography operates on several levels of analysis. The first step in a feminist understanding of pornography is to contextualize it, to relate pornography to the formative conditions of domination and subordination which characterize contemporary male/female relations. "The major theme of pornography as a genre is male power, its nature, its magnitude, its use, its meaning."³¹¹ As institution, empire³¹² and practice,³¹³ by eulogizing male power and eroto-legitimizing female powerlessness, pornography generates, reflects and reinforces the relations of gender inequality, exploitation, humiliation, degradation, objectification, dehumanization and subjugation that characterize contemporary society. In and of itself, pornography demonstrates men's power in that it captures their controlling ability to make women's bodies say what men want them to say. Feminism understands pornography from the bottom up, from the perspective of its victims, women, "the sexual disappeared"³¹⁴ of modern society, not its male entrepreneurs nor its consumers.

By locating pornography in the experiential circumstances of women's lives, by shifting attention from amorphous and indeterminate abstract ideas such as "morality" and "free speech", feminism reconstructs the question of pornography as an issue of equality. Feminism argues that pornography violates women's human and civil rights, it is therefore a form of sex discrimination.³¹⁵

Similarly, Dworkin claims that "At the heart of the female condition is pornography; it is the ideology that is the source of all the rest". *Right Wing Women* (1983) at 222-223, but see *contra*, Carol Vance and Ann Barr Snitow, "Toward a Conversation about Sex in Feminism" (1984), 10 *Signs* 126, 132.

311. Dworkin, *Male Flood*, *supra* note 307 at 24; C. MacKinnon, "Francis Biddle's Sister", in *Feminism Unmodified* 163 (1987); Myrna Kostash, "Whose Body, Whose Self?"; M. Fitzgerald, C. Guberman, M. Wolfe, *Still Ain't Satisfied* 43 (1982).

312. "There are more hardcore bookstores than there are McDonalds" in "Pornography: Liberalism or Oppression", *Off Our Backs* 14, March 1983. See generally, Jacobs, *supra* note 305; *Report of the Special Committee on Pornography and Prostitution in Canada Vol. 1* (1985), *passim*.

M. Langelan, "The Political Economy of Pornography" (1981), 5 *Aegis*; Cook, "The X-Rated Economy", *Forbes*, Sept. 18, 1978, at 81. In 1981, Americans spent \$2.75 billion at motion picture theatres, INTERNATIONAL MOTION PICTURE ALMANAC 28A (R. Gertner ed. 1984), and consumed \$4.246 billion worth of phonograph records and tapes, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 237 (1984). In 1980, pornographic video cassettes outsold other video cassettes by three to one. Langelan, *ibid.*, at 8.

Galloway and Thornton "Crackdown on Pornography — A No-Win Battle" *U.S. News and World Report* June 4th 1986, at 84.

313. Pornography is more than abstract speech; it is a horrifying, perhaps deadly, reality and process for many women. See also MacKinnon, "Not Moral", *supra* note 301 at 337.

314. A. Dworkin, quoted in C. MacKinnon, "Pornography as Sex Discrimination" (1986), 4 *Law & Inequality* 38, at 40 [hereinafter cited as "Discrimination"].

315. Catherine A. MacKinnon, "Discrimination"; "... pornography, not alone but crucially,

Second, concretizing their understanding of power(lessness), feminists argue that pornography is primarily about physical and psychological violence against women, not sex.³¹⁶ Violence is pervasive in pornography, both hard and soft core; if one simply looks at it one can see that women are the victims of routinized violence. Often, if the violence is not explicit, it is implied or waiting in the background. Pornography both sanctions and promotes violence against women. It terrorizes.³¹⁷ Moreover, quantitatively and qualitatively, it is on the increase.³¹⁸

Third, pornography as violence, through its production and proliferation, directly *harms* women, individually and as an identifiable group. The harm operates on several different levels.

a) “Models”³¹⁹ who are directly involved in the pornography industry are harmed. Many are hurt in the course of the “recruitment” and making

institutionalizes a subhuman victimized second class status for women in particular” at 44. See also, “Speech”, *supra* note 301; *Feminism Unmodified* at 200-201.

316. Kate Millet, *Sexual Politics* (1970); Robert Stoller, *Perversion, The Erotic Form of Hatred* (1976); Colloquium, “Violent Pornography: Degradation of Women versus Right of Free Speech” (1978-79), 8 N.Y.U. Rev. Law and Soc. Change, 181-308; Elizabeth Spahn “On Sex and Violence” (1984-85), 20 New England L.Rev. 629; Edward Donnerstein, “Sex and Censorship” (1984), 20(b) Film Comment 34-35; “Pornography: Its Effect on Violence Against Women” in *Pornography and Sexual Aggression* 53-81 (Malamuth and Donnerstein eds. 1984); D. Linz, Steven Penrod, Ed. Donnerstein, *The Question of Pornography: Research Findings and Policy Implications* (1987); “The Attorney General’s Commission on Pornography: The Gaps between the Findings and the Facts” (1987), 4 A.B.F.R.J. 713; West, “Hedonic Lives” *supra* note 164 at 66.

It must be made clear, however, that feminism distances itself from moralist objections. It does not seek to repress sexuality nor object to the portrayal of sexual conduct, but seeks to discriminate between pornography (violence) and erotica. It seeks to alter, not eradicate, sexuality! See Gloria Steinem, “Erotica v. Pornography: A Clear and Present Difference”, in *Outrageous Acts and Everyday Rebellions* 219 (1983). A. Dworkin *Pornography* 199-200 (1981). See also Ann Garry, “Pornography and Respect for Women” (1976-78), 4 Social Theory and Practice 395; and Irene Diamond *supra* note 307 at 686.

MacKinnon appears not to agree with this analysis. She claims that this is a liberal position which “trivialize(s) and evade(s) the essence of (the feminist) critique, while seeming to express it”. “Not Moral”, *supra* note 301 at 343. See also “Linda’s Life and Andrea’s Work” in *Feminism Unmodified* at 130. As I understand her, she appears to believe that so pervasive is the inequality, hierarchy and domination of contemporary society that it is difficult to distinguish violence from heterosexual sex. See also Dworkin, *Intercourse* (1987). She suggests that the “violence not sex” critique fails to ask deeper questions of what are women’s identities, independent of that which are created for them by men.

317. A. Dworkin, “Pornography: The New Terrorism” (1978), *The Body Politic*, August, 1978; MacKinnon, “Not Moral”, *supra* note 426 at 301; *Feminism Unmodified* at 140.

318. C. Jacobs, “Patterns of Violence”, *supra* note 305; Mahoney, *supra* note 428 at 95; Malamuth and Spinner, “A Longitudinal Context Analysis of Sexual Violence in the Best Selling Erotic Magazines” (1980), 16 J. of Sex Research 226; *But see* D. Linz, Steven Penrod, E. Donnerstein, *The Attorney General’s Commission on Pornography: The Gaps between the Findings and the Facts* (1987), 4 A.B.F.R.J. 713, 716-718.

319. The use of the word “model” is both accurate and intentional for in pornography these women are treated as reified objects, not as persons.

such movies,³²⁰ some have been killed.³²¹ The material doesn't lie . . . the women are hurting when they are "cut, beaten, tied and hung . . ."³²² Often, pornography is a "recording, not a simulation of real violence".³²³ The more "fortunate" women who are not physically hurt are reduced to accessible orifices, objects of masculinist gratification, non-persons. There is some evidence of self-hatred among pornographic models.³²⁴

b) Harm is caused to women on whom men attempt to realize their pornographic desires. The pithyist encapsulation of this claim is Robin Morgan's proposition that "pornography is the theory, and rape is the practice".³²⁵ This can be understood as "pornography as text-book",³²⁶ men force pornography on women and demand that they do what they see. Pornography educates, instructs and inspires men in the art of "sexual callousness".³²⁷ It is claimed that there is a direct causal connection between pornography and violence against women, a causality which "is essentially collective and totalistic and contextual".³²⁸ Viewed in this

320. K. Barry, *Female Sexual Slavery* (1979); L. Lovelace & M. McGrady, *Ordeal* (1980); U.N. Economic and Social Council; Activities for the Advancement of Women: Equality Development and Peace, Report of Jean Fernand-Laurent (March 17, 1983); Lederer, "Then and Now: Interviews with a Former Pornography Model" *Take Back the Night* 57 (1980); A Dworkin, "Pornography's 'Exquisite Volunteers'" *Ms Magazine* March 1981, at 65.

321. Snuff movies exist. See MacKinnon, "Not Moral", *supra* note 301 at 33 fn. 61.

322. See Baldwin *supra* note 304 at 637.

323. West, "Hedonic Lives" *supra* note 164 at 68.

324. N. Van den Ven and D. Russell eds. *Crimes Against Women: Proceedings of the International Tribunal* 182-183 (1976).

325. Morgan, "Theory and Practice: Pornography and Rape" in *Going Too Far* 163, 169 (1977); see also S. Griffin, *Pornography and Silence* (1981); Leah Fritz, "Pornography as Gynocidal Propaganda" (1978-79), 8 N.Y.U. Rev. L. Soc. Change 219.

326. Margaret Baldwin, "The Sexuality of Inequality" *supra* note 304 at 639.

327. Baldwin *ibid.* at 640-641. For example, Brownmiller argues that pornography "promotes a climate in which acts of sexual hostility directed against women are not only tolerated but ideologically encouraged" *Against Our Will* 395 (1975).

328. C. MacKinnon, "Not Moral", *supra* note 301 at 338. See also 323-324. "Speech", *supra* note at 43-60; *Feminism Unmodified* at 202. Joel Bakan, *supra* note 305.

This claim stands in stark opposition to the conclusion reached by the 1970 Commission . . . "empirical research . . . has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behaviour among youth or adults". Report, *supra* note 304 at 139. For a critique, see Diamond, *supra* note 307 at 693-697.

More recently, the *Report on Pornography and Prostitution in Canada*, Vol. 1 (1985) was reluctant but overt in admitting that it,

is not prepared to state, *solely on the evidence and research it has seen*, that pornography is a significant causal factor in the commission of some forms of violent crime, in the sexual abuse of children, or the disintegration of communities and societies, at 99.

But the *Attorney General's Commission on Pornography, Final Report* (1986) did find such a causal connection at 324.

This has become the most controversial claim and a colossal amount of *laboratory* research has been put into (dis)proving that pornography increases misogyny and sexual callousness. A catalogue of *some* of the studies includes: Baron, "The Aggression-Inhibiting Influence of

light, pornography encourages and legitimizes practices such as sexual harassment, child abuse, assault and rape.

Worse still, women who are exposed to pornography internalize pornography's misogynistic construction of their identity/nature, thus

Heightened Sexual Arousal" (1974), 30 J. Personality & Soc. Psych. 318; Baron, "The Aggression-Inhibiting Influence of Sexual Humor" (1978), 36 J. Personality & Soc. Psych. 189; Baron, "Sexual Arousal and Physical Aggression: The Inhibiting Influence of 'Cheesecake and Nudes'" (1974), 3 Bull. Psychonomic Soc'y 337; Baron and Strauss, "Sexual Stratification, Pornography and Rape in the United States" and Court, "Sex and Violence: A Ripple Effect" both in *Pornography and Sexual Aggression* (Malamuth and Donnerstein eds. 1984); Mosher & Katz, "Pornographic Films, Male Verbal Aggression Against Women, and Guilt" (1971), 8 Technical Report of the Commission on Obscenity and Pornography 357; Siegman & Dintur, "The Catharsis of Aggression and Hostility" (1977), 41 Psych'l Rep. 399; Zillmann, Johnson & Hanrahan, "Pacifying Effect of Happy Ending of Communications Involving Aggression" (1973), 32 Psych'l Rep. 967; Zillman & Sapolsky, "What Mediates the Effect of Mild Erotica on annoyance and Hostile Behaviour in Males? (1977), 35 J. Personality & Soc. Psych. 587; Donnerstein & Barrett, "Effects of Erotic Stimuli on Male Aggression Toward Females" (1978), 36 J. Personality & Soc. Psych. 180; Donnerstein, Donnerstein, & Barrett, "Where Is the Facilitation of Media Violence: The Effects of Non-Exposure and Placement of Anger Arousal" (1976), 10 J. Research Personality 386; Donnerstein, Donnerstein & Evans, "Erotic Stimuli and Aggression: Facilitation or Inhibition" (1975) 32 J. Personality & Soc. Psych. 237; Jaffe & Berger, "Cultural Generality of the Relationship Between Sex and Aggression" (1977), 41 Psych'l Rep. 335; Jaffe, Malamuth, Feingold & Feshbach, "Sexual Arousal and Behavioral Aggression" (1974), 30 J. Personality & Soc. Psych. 759; Lenes & Hart, "The Influence of Pornography and Violence on Attitudes and Guilt" (1975), 45 J. Sch. Health 447; Loye, "T.V.'s Impact on Adults: It's Not All Bad News" (1978), Psych. Today 87; Mueller, Nelson & Donnerstein, "Facilitation Effects of Media Violence on Helping" (1977), 40 Psych'l Rep. 775; Tannenbaum, "Emotional Arousal As a Mediator of Erotic Communication Effects" (1971), 8 Technical Report of the Commission on Obscenity and Pornography 326; Berkowitz, "Sex and Violence: We Can't Have It Both Ways" (1971), 5 Psychology Today 14; Wills, "Measuring the Impact of Erotica" (1977), 11 Psychology Today 30; H. Eysenck & D. Nias, *Sex, Violence and the Media* 257 (1979); Donnerstein, "Aggressive Erotica and Violence Against Women" (1980), 39 J. Personality and Social Psychology 269; Feshbach & Malamuth, "Sex and Aggression: Proving the Link" (1978), 12 Psychology Today 110; Malamuth and Donnerstein, *Pornography and Sexual Aggression* (1984). See also Chervenak, "Selected Bibliography on Pornography and Violence" (1979), 40 U. Pitt. L. Rev. 652, 658-60;

My own viewpoint is that if we believe that "literature" can have a beneficial impact in structuring our society, why can it not also have a negative impact? Although we must be very careful about "inferring causality from correlational evidence", the nexus between pornography and violence is certainly plausible. This is an intuitive and perhaps "unprovable assumption . . ." (*Paris Adult Theatre v. Slaton* 413 U.S. 49, 60-61) (1972) but it can hardly be denied that advertising doesn't work. Second, what we have here is a classic example of sliding to the peripheral. Scientism and empiricism, the realm of experts, has become the dominant and exclusive discourse in the thrust and parry of debate. Normative engagement is displaced by a pseudo-objective debate which may obscure preconceptions and bias rather than articulating them. For a critique of the androcentric tilt of scientism see Margaret Benston, "Feminism and the Critique of Scientific Method" in *Feminism in Canada*, *supra* note 14 at 47. See also Evelyn Fox Keller, "Feminist Critique of Science" (1980), 1 *Fundamenta Scientiae*.

Indeed the issue of pornography and violence is a classic example of the indeterminacy, malleability and bias of scientific research, dependent upon the unquestioned assumptions. Compare, for example, *President's Commission on the Causes and Prevention of Violence*

undercutting their autonomy, lowering their self image, crushing their potential and permitting the continuance of male domination.³²⁹

c) Women, in general, are harmed because they suffer from a hate propaganda³³⁰ which annihilates their dignity and self-respect as human beings, by portraying them as no more than fuckable objects or degrading them as virginal nymphomaniacs who need men to tame them, or beat them. In this perspective, women are whores by nature, nothing more than the sum of their sexual parts. Pornography, contributes in a vitally important way to the continued exploitation and subordination of women as a class, by constructing them as less than human. By desensitizing men to the personhood of women, it helps construct and reinforce women's lived reality of inequality.³³¹

These themes are all brought together in the following lengthy quotation by Andrea Dworkin:

In the United States, pornography is an \$8-billion trade in sexual exploitation.

(1969) with *Report of Commission on Obscenity and Pornography* (Washington, D.C., Govt. Printing Office, 1970) which reach diametrically competing conclusions with respect to the impact of the media on violence-inducing behaviour. See Diamond *supra* note 307 at 691. Beyond this there is the fundamental issue of what qualifies as competent material. Should we accept claims by people who work in women's shelters and police officers that in their experience pornography and violence are related?

At least one U.S. case has already acknowledged the causal role of pornography in promoting violence: *State v. Herberg* 324 N.W. 2d 346 (Minn. 1982). Moreover, Judge Sarah Evans Baker and Judge Frank Easterbrook both accepted that pornography does cause harm ... thereby going further than they may have intended to. They calculated, however, that the harm was not so great as to merit an exception being made to the First Amendment. See *American Booksellers v. Hudnut* 598 F. Supp. 1316 (S.D. Ind. 1984) all 771 F. 2d 323 (7th Cir. 1985). For a useful discussion of this case see R. Benson, "Pornography and the First Amendment: *American Booksellers v. Hudnut*" (1986), 9 Harv. Women's Law Journal 153. 329. C. Jacobs, "Patterns of Violence: A Feminist Perspective on the Regulation of Pornography" (1984), 7 Harvard Womens L.J. 5, 18; M. Vivar, "The New Anti-Female Violent Pornography: Is Moral Condemnation the Only Justifiable Response?" (1981-82), 7 Law and Psych. Rev. 53, 63.

330. Labelle, "The Propaganda of Misogyny" in *Take Back the Night* *supra* note 307, at 174; Susan Brownmiller claims that "pornography is the undiluted essence of female propaganda" in *Against Our Will* 394 (1975).

331. There is a fourth harm caused by pornography ... the harm to men. As Ms. Anthony posits:

Violent pornography is also harmful to men and lessens the quality of community life ... It is dangerous for men to have the dehumanized view of sex which results from viewing pornography. It distorts their image of women and debases them as well.

She continues:

"This type of propaganda portrayed in pornography is equally harmful to men and women."

Dialogue, in "Colloquium on Violent Pornography" *supra* note 316, at 191-192.

Although the last sentence clearly goes too far, it must be recognized that pornography is not necessarily good for men just because they like it, or use it voluntarily. If structures are important, then it is not open to us to blithely identify voluntariness with "the good".

It is women turned into subhumans, beaver, pussy, body parts, genitals exposed, buttocks, breasts, mouths opened and throats penetrated, covered in semen, pissed on, shitted on, hung from light fixtures, tortured, maimed, bleeding, disemboweled, killed.

It is some creature called female, used.

It is scissors poised in the vagina and objects stuck in it, a smile on the woman's face, her tongue hanging out.

It is a woman being fucked by dogs, horses, snakes.

It is every torture in every prison cell in the world, done to women and sold as sexual entertainment.

It is rape and gang rape and anal rape and throat rape: and it is the woman raped, asking for more.

It is the woman in the picture to whom it is really happening and the woman against whom the picture is used, to make them do what the woman in the picture is doing.

It is the power men have over women turned into sexual acts men do to women, because pornography is the power and the act.

It is the conditioning of erection and orgasm in men to the powerlessness of women; our inferiority, humiliation, pain, torment; to us as objects, things or commodities for use in sex as servants.

It sexualizes inequality and in doing so creates discrimination as a sex-based practice.

It permeates the political condition of women in society by being the substance of our inequality however located — in jobs, in education, in marriage, *in life*.

It is women, kept a sexual underclass, kept available for rape and battery and incest and prostitution.

It is what we are under male domination; it is what we are for under male domination.

It is the heretofore hidden (from us) system of subordination that women have been told is just life.

Under male supremacy, it is the synonym for what being a woman is.

It is access to our bodies as a birthright to men: the grant, the gift, the permission, the license, the proof, the promise, the method, how-to; it is us accessible, no matter what the law pretends to say, no matter what we pretend to say.

It is physical injury and physical humiliation and physical pain: to the women against who it is used after it is made; to the women used to make it.

As words alone, or words and pictures, moving or still, it creates systematic harm to women in the form of discrimination and physical hurt. It creates harm inevitably by its nature because of what it is and what it does. The harm will occur as long as it is made and used. The name of the next victim is unknown, but everything else is known.

Because of it — because it is the subordination of women perfectly achieved — the abuse done to us by any human standard is perceived as using us for what we are by nature: women are whores; women want to be raped; she provoked it; women like to be hurt; she says no but means yes because she wants to be taken against her will which is not really her will because what she wants underneath is to have anything done to her that violates or humiliates or hurts her; she wants it, because she is a

woman, no matter what it is, because she is a woman; that is how women are, what women are, what women are for. This view is institutionally expressed in law. So much for equal protection.

If it were being done to human beings, it would be reckoned an atrocity. It is being done to women. It is reckoned fun, pleasure, entertainment, sex, somebody's (not something's) civil liberty no less.³³²

3) *Feminist Responses to Pornography*

Feminists have not limited themselves to merely describing and critiquing the misogynistic nature of pornography. Reflecting their own horror and fear of pornography, and motivated by the lived experience of other women who have been its victims, feminists have developed various strategies of political resistance, extra-legal, illegal, and legal.

Extra-legally, feminists have developed consumer boycott techniques and economic sanctions such as picketing, letter-writing campaigns, petitions and leafletting. On an educational level, they have developed speak-outs, teach-ins, and published information on the producers, distributors, exhibitors and users of pornography. There have been consciousness-raising slide shows and documentaries on the harm caused by pornography.³³³ Others have suggested the development of a subversive, "alternative literature of arousal";³³⁴ or the creation of new types of videos which would break the connection between sex and harm and demonstrate the realizability of egalitarian sexual relationships.³³⁵ Many feminists help the victims of pornography through abuse shelters. Still others have participated in illegal "vigilante squads" which have, on

332. Andrea Dworkin, "Against the Male Flood" (1985), 8 *Harvard Women's Law Journal* 1, 10-11. For the legal correlative of such an understanding see the Anti-Pornography Ordinance, Minneapolis Minn., Ordinance amending tit. 7, chs. 139 and 141, Minneapolis Code of Ordinances Relating to Civil Rights (Dec. 30, 1983). For a text, see *Feminism Unmodified* at 262, footnote 1. I should also note that I do not think Dworkin's analysis can qualify as a pornographic vignette. See Part A of this article at footnote 24 p. 310.

333. See for example, *Not a Love Story*.

334. Nancy W. Waring, "Coming to Terms with Pornography" (1986), 8 *Research in Law Deviance and Social Control* 85; Paula Webster, "Pornography and Pleasure" (1981), 3 *Heresies* 48-51; Jessica Benjamin, "Master and Slave: The Fantasy of Erotic Domination" in *Powers of Desire* 380-99 (Ann Snitow ed. 1983); Ann Snitow, "Mass Market Romance: Pornography for Women is Different" in Snitow *ibid.* at 245-263; D. English, "The Politics of Porn" *Mother Jones* 20, April 1980; Ann Ferguson, "Sex War . . ." (1984), 10 *Signs* 106, 111; Audre Lorde, "Uses of the Erotic: The Erotic as Power", [1984] *Sister Outsider* 55.

335. Ann Garry, "Pornography and Respect for Women" (1978), 4 *Social Theory and Practice* 395; Bette Gordon's film "Variety" is even more "ambitious" in that it posits that pornography is not a monolithic bloc, that it is potentially subversive and that attempts should be made by women to appropriate its subversive elements to expand women's sexual freedom. See Gordon "Variety: The Pleasure of Looking", in *Pleasure and Danger: Exploring Female Sexuality* 189-203 (C. Vance ed. 1984); but see Geraldine Finn, "Against Sexual Imagery: Alternative or Otherwise" (1986), 12 *Parallelegramme*, which critiques the whole voyeuristic technique as masculinist.

occasion, harassed both distributors and exhibitors, as well as perpetrating organized vandalism.

Legally, feminists have been creative in developing common law and statutory policies to both protect women and to try to hit the pornocrats where it hurts. On the criminal plane, there have been calls for more rigorous enforcement of laws on (sexual) assault and battering against both the makers of pornography and men who live out their pornographic desires on women. There have been arguments favouring an expanded conception of obscenity so as to incorporate the feminist interpretation of pornography, with limited success.³³⁶ It has been suggested that there be amendments to the hate literature provisions of the Canadian *Criminal Code* so as to incorporate pornography³³⁷ and that pornographers be prosecuted under prostitution statutes.³³⁸ There has been support, although qualified by some strong reservations, for new anti-pornography legislation recently introduced by the current Canadian administration, i.e. Bill C-54.³³⁹

In the United States there has been feminist support for zoning regulations,³⁴⁰ and the use of public nuisance statutes in an attempt to minimize access to the impact of pornography.³⁴¹ Tort law has presented

336. C. Jacobs, "Patterns of Violence", *supra* note 305; Kathleen Mahoney, "Obscenity, Morals and Law", *supra* note 303; Sheila Noonan, "Pornography" (1985), 45 C.R. (3d) 61. A judicial propensity to adopt such an approach has manifested itself in several Canadian cases: *R. v. Chin* (unreported, Ont. Provincial Ct. 22nd Feb. 1983); *R. v. Doug Rankine Co. Ltd.* (1983), 36 C.R. (3d) 154; 9 C.C.C. (3d) 53 (Ont. Co. Ct.); *R. v. Ramsingh* (1984), 14 C.C.C. (3d) 230 (Man. Q.B.) Ferg. J.; *R. v. Wagner* (1985), 43 C.R. (3d) 318, 36 Alta. L.Rev. (2d) 301 (Q.B.) Shannon J.; *R. v. Red Hot Video* (1985), 45 C.R. (3d) 36 (B.C.C.A.) Nemetz C.J.B.C.; *Towne Cinema Theatres v. R.*, *supra* note 430.

337. Toronto Area Caucus of Women and the Law, 1984 Recommendations for the Amendment of the Criminal Code, i.e. s. 159. For a discussion and proposed text see K. Lahey, "Charter and Pornography", *supra* note 305 at 666.

338. L.D. Hutchins, "Pornography: The Prosecution of Pornographers Under Prostitution Statutes — A New Approach" (1986-87), 37 Syracuse L.Rev. 977.

339. See *supra* note 305.

340. C. Jacobs, *supra* note 305. See e.g., *Euclid v. Amber Reality Co.* 272 U.S. 365 (1926); *Young v. American Mini Theatres* 427 U.S. 50 (1976); *City of Renton v. Playtime Theatres* 106 S. Ct. 925 (1986). See also Note "Constitutional Law — First Amendment — Zoning Prohibition", 12 Seton Hall 311 (1981-82). At the municipal level in Canada there has been a proliferation of by-laws which attempt to regulate obscene material through zoning requirements and by direct regulating the sale of obscene material. For a listing of some of the relevant municipal by-laws, see Mahoney, "Obscenity and Public Policy" (1986), 50 Sask. L.Rev. 75, 100 n 132. Some cases that discuss the operation of these varied by-laws are *Red Hot Video Ltd. v. City of Vancouver* (1985), 18 C.C.C. (3d) 153 (B.C.C.A.); *Re Information Retailers Association* (1985), 22 D.L.Rev. (4th) 161 (Ont. C.A.); *Re Hamilton Independent Variety* (1983), 143 D.L.Rev. (3rd) 498 (Ont. C.A.); *Re Shalmark Hotels* (1981), 32 O.R. (2d) 129 (Ont. Div. Ct.); *Re Nordee Investments* (1984), 48 O.R. (2d) 123 (Ont. C.A.).

341. *Brockett v. Spokane Arcades* 105 S. Ct. 2794 (1985). See C. Jacobs, *supra* note 305 at 48-51. L.D. Hutchins, *supra* note 338 at 981-983; "Colloquium on Violent Pornography", *supra* note 316 at 197; Note, "Enjoying Obscenity as a Public Nuisance and the Prior Restraint

itself as a potentially rich source of legal remedies including actions based upon infringement of women's privacy,³⁴² mental distress,³⁴³ private nuisance, unauthorized sexual portrayals,³⁴⁴ and the controversial anti-pornography ordinances developed by Andrea Dworkin and Catharine A. MacKinnon.³⁴⁵ There has also been the related claim that pornography infringes Canadian provincial human rights codes.³⁴⁶ It seems to me that such activities are a tangible manifestation of the "ethic of care" in practice, a significant effort "to apprehend the reality of the other", and to act upon it.

IV. *Feminism and the Turn to Law: Part of the Problem, Part of the Solution*

Sometimes you become what you are fighting.

Catharine MacKinnon³⁴⁷

[while it is] unpleasant to be locked out . . . it is worse, perhaps, to be locked in

Virginia Wolf³⁴⁸

Pornography has backed women into a corner: through its integral connection with violence it is a threat to the health, safety and even existence of women.³⁴⁹ Women, if they are to protect themselves from

Doctrine" (1984), 84 Col. L.Rev. 1616; "Regulation of Obscenity through Nuisance Statutes" (1983), 19 Wake Forest L.Rev. 7; "Pornography, Padlocks and Prior Restraints" (1983), 58 N.Y.U.L.Rev. 1478; Bendleman, "Civilizing Pornography, The Case for an Exclusive Obscenity Nuisance Statute" (1977), 44 U. Chic. L.Rev. 509; O'Connor, "Nuisance Abatement Law" (1977), 46 Fordham L.Rev. 57; Oglesby, "Porno non est pro bono publico" (1977), 4 Hastings Constit. L.Q. 385.

342. Barbara S. Bryant, "Sexual Display of Women's Bodies — A Violation of Privacy" (1980), 10 Golden Gate U.L. Rev. 1211; Ruth Colker, "Pornography and Privacy: Towards the Development of a Group Based Theory for Sex Based Intrusions of Privacy" (1983), 1 Law and Inequality 191.

343. J. Bakan, *supra* note 305.

344. Ruth Colker, "Regulation of Unauthorized Sexual Portrayals" (1986-87), 20 New England L.Rev. 687.

345. Anti-Pornography Ordinances, *supra* note 332. Some Canadian Feminists also support such measures. See "AGM Rejects New Porn Bill" (1987), 2 Feminist Action 7.

346. *Sask. Human Rights Comm. v. Waldo* (1985), 5 Can. Human Rights Rep. 17609-17783 or 2074.

347. *Feminism Unmodified* at 91.

348. *A Room of One's Own* cited in Showalter "Feminist Criticism in the Wilderness" (1981-82), 8 Critical Inquiry 179, 181.

349. The Amicus Curiae Brief — Linda Marchiano and Estate of Dorothy Stratten at 18-19, *Hudnut v. American Booksellers Ass'n*, Docket No. 84-3147 (7th Cir. 1985) cites studies which show that between one-fifth and one-third of all women reported some sort of childhood sexual encounter with an adult male, that forty-four percent of all women had reported an attempted or completed rape in their lives, that twenty-one percent of women who had ever been married reported physical violence by a husband. MacKinnon stresses that these

these atrocities, to survive, must do something about it.³⁵⁰ There is no alternative . . . it is a matter of life and death. Feminism as the voice and practice of womankind must respond. It cannot abandon women to the pornographers,³⁵¹ the rapists, the batterers.³⁵²

The question is how.³⁵³ It is at this exact point that the anguishing dilemma between theory and practice, vision and need, aspiration and immediacy comes into sharp relief. Political necessity dictates do whatever is possible to protect women, and the law presents itself as a potentially important arena for self-defence. Yet, at the same time, a consciousness of the violence that is inscribed within the very idea and practice of contemporary law itself may make resort to law problematic, perhaps even antithetical to a movement that considers the ethic of care to be an important facet of its agenda.

From the earliest days of the women's movement, struggle in the legal arena has been a central component of feminist practice. Recognizing that law is a constitutive element of the polity, feminists have sought to make the law more responsive to women's needs by gaining access to their own property, achieving suffrage, having their reproductive autonomy at least partially recognized, sponsoring changes to rape laws, lobbying for pay equity, and litigation through the highest courts in the land. Furthermore, Canadian feminists have achieved what the E.R.A. movement failed to do: they have had equality provisions enshrined to the Constitution.

Clearly these achievements have not resulted in substantive equality or anything like it, but what they do suggest is that the legal system is flexible enough to respond to women's needs, that progress — in the liberal sense of the word — is being made by women. They suggest that women and feminists are gradually gaining access to the corridors of traditional power, that their demands are being heard, and even acted upon, and that law is a worthwhile arena for social and political activity for women. In the light of such a long history of exclusion,

statistics reflect only *reported* abuse, and that substantial amounts of sexual and domestic violence are generally agreed to go unreported.

She argues,

Pornography is at the centre of a cycle of abuse that cannot be reached or stopped without reaching or stopping the pornography that is its incentive, product, stimulus and realization,

"Pornography as Sex Discrimination" *supra* note 314 at 48.

350. So also, must socially conscious and politically responsible men.

351. Lahey "Charter and Pornography", *supra* note 301 at 671.

352. MacKinnon, "Agenda", *supra* note 146.

353. As Marilyn French points out, "the major problem facing feminists can be easily summed up: there is no clear right way to move". *Beyond Power* at 484.

marginalization and subordination, such victories are undoubtedly encouraging, even exhilarating. Thus, when pornography becomes a concern for feminists it is inevitable that the quest for legal remedies should become one of the central components of the feminist programme.

The history of feminist jurisprudence, although covering a much shorter time span, broadly maps the development of the feminist legal agenda. Some of the earliest examples of feminist jurisprudence criticised the exclusion of women and issues which were of particular concern to women, from both the law and jurisprudential reflections on the legal system, while simultaneously highlighting the pervasive male biases and assumptions.³⁵⁴ This "first wave" was followed by what might be described as a "demand for access" scholarship, a filling in of the gaps so as to render the legal system more fair.³⁵⁵

A third wave in feminist legal scholarship suggested that the second approach was inadequate in that it did not adequately comprehend the deep structural embeddedness of androcentricity in law, and therefore its ability to resist feminist input.³⁵⁶ This approach suggested that the feminist critique and reconstruction of law would have to be even more ambitious, and difficult, than had hitherto been realized. It highlighted the epistemologically gendered nature of law itself, that law is a vital part of the power/knowledge/ideology matrix that structures our lived experiences. For example, Catharine MacKinnon's critique of traditional rape law poignantly highlights the way in which the "neutrality" and "objectivity" of that law is, in reality, premised upon a deeply entrenched male viewpoint, that is, the viewpoint of the rapist or potential rapist, and not women, the victims of rape. She argues that if we were to seriously consider and adopt an understanding of rape that reflects women's understanding of rape, then the law would be very different.³⁵⁷

While I do not wish to cast doubt on the significance of these achievements of feminist practice or theory, nor denigrate their importance, I think that a critical jurisprudence must continue to push forward and point out their potential limitations, and possible dangers. In the spirit of the feminist dynamic already traced in this paper, there must

354. See for example J. Rifkin, "Toward a Theory of Law and Patriarchy" (1980), 3 Harv. W.L.J. 83; D. Polan, "Towards a Theory of Law and Patriarchy"; N. Taub and E. Schneider, "Perspectives on Womens Subordination and the Role of Law" in Kairys, *The Politics of Law* 12 & 4 & 3 (1983).

355. W. Chafe, *Women and Equality* (1977). For a review and assessment of the theory and practice of such perspectives, see Olsen, *supra* note 8 at 1529-1560.

356. See e.g. Olsen, *The Sex of Law*, (unpublished manuscript, 1984).

357. MacKinnon, "Feminist Jurisprudence", *supra* note 209.

be a continual critical consciousness of the pervasiveness of andocentrism at every level, with the correlative progressive imperative “to question everything”. I will concentrate my reflections first on the theoretical end of the spectrum, and then return to a discussion of the legal remedies proposed by anti-pornography activists.

I am concerned that the feminist emphasis on unpacking the deep structural ideological assumptions of law — the sex of law — has, perhaps, led to the under-emphasis on the “how of law”. By the “how of law” I mean the way in which law is made material or relevant in a community, the operational norms of law. The feminist analysis of the ideological significance of law is crucial, but feminism must also be careful to remain conscious that law is more than an ideology, that it is “operationalized” in very specific ways, that contemporary law is a vital mechanism of social control and political domination. As I have suggested in Part A of this essay, it is the subtle interplay of violence and ideology, not their disjunction, that accounts for the genius of law. Consequently, if violence is an androcentric quality,³⁵⁸ or the product of a male dominated society unable to reconcile the tension between “self” and “other”, then the bias of law may be even more deeply embedded than even the most progressive feminist insights have already uncovered. The feminist critique and reconstruction must, therefore, not only unravel and rework the politically partisan nature of law, it must develop visions of the very operation of law itself, and confront the problematic relationship between care, control and coercion. A feminist jurisprudence must invoke its critical ability to take a “double look”³⁵⁹ at law, for the patriarchal unconscious may be even more deeply entrenched than we have yet understood.³⁶⁰

To elaborate, it is not simply the instrumental problem of how to make traditionally sexist laws, legal institutions and legal actors respond to the needs of women, although this is important, but the more fundamental dilemma of maintaining feminist visions and aspirations while at the same time moving from “here” to “there”. Put differently, if the purpose

358. S. Brownmiller, *Against Our Wills* (1975).

359. See for example, Peggy MacIntosh, “Feeling Like a Fraud” (1985) (unpublished manuscript, Wellesley College) for a fruitful discussion of feminist’s ability to critically “double vision” concepts, ideologies and practices;

We need a double vision [double consciousness] both of what the dominant culture stands for and what we lower caste people who are undervalued can develop in the way of a critique of the dominant culture, *Ibid.*, at 8 and 15.

360. I should point out that my aim is not to further impose burdens on those who are already denied equality, to make their life even more oppressive and demanding. I also believe that men should be incorporating the ethic of care in their law-making, my point here is to ask “at what price access” and “on whose terms?”

of feminism is, at least in part, to challenge domination,³⁶¹ to create a society founded upon and structured by desiderata such as the preservation of relations, “the ability to apprehend the reality of others”,³⁶² a rejection of violence and the avoidance of harm³⁶³ then recourse to contemporary law, and all the violent baggage and underpinnings that go along with it,³⁶⁴ appears to contradict the long term goal, perhaps “recreat(ing) the patterns of oppression that feminism arose to combat”.³⁶⁵ Even if law is a powerful political tool, feminists must confront the difficult and profoundly disturbing question of whether they are, at bottom, merely substituting an agenda that is itself lamentably imbricated with violence for that of a male agenda, and not a feminist reconstruction of law. Would it be a feminist mimicry of male discourse and practice, not a transformative alternative? Does it run the risk of being a capitulation to, not a rejection of, patriarchal lore, lure and law?³⁶⁶ Contemporary law, understood simply as an instrument of social engineering,³⁶⁷ may be an anathema to some of the basic tenets of feminism. Legal fetishism may be more deeply entrenched in the popular and legal psyches than we had ever imagined or feared.³⁶⁸

361. Scales, *supra* note 179 at 1382; Sheila Rowbotham, *Woman's Estate* (1973); Mary Daly, *Beyond God the Father* (1973).

362. Jean Grimshaw, Ch. 7, *supra* note 44.

363. See, J.D. Wine, Hughes and Finn in *Feminism in Canada*, *supra* note 14 at 83, 287 and 306; Ruth Colker, “Consciousness and Love: Towards a Feminist-Theological Discourse” 51 (1988) (unpublished manuscript); Gilligan, *Voice* *passim*.

364. MacKinnon is aware of this in her earlier work. “The law sees and treats women in the way men see and treat women. The liberal state *coercively* and *authoritatively* constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, the substantive policies.” “Feminist Jurisprudence”, *supra* note 209 at 644 [emphasis added.] However, like most critical legal scholars, she tends to emphasize the *ideological* significance of law — in this case embedded maleness — at the expense of the coercive/violent aspects. Consequently, her transformative vision is pitched at the ideological level, which is no doubt crucial, but again partial.

365. Ferguson, *supra* note 43 at 203.

366. Sandra Gilbert, Introduction to *Newly Born Woman* at xi.

367. See for example, Ann Scales, “Feminist Jurisprudence”, *supra* note 179; Elizabeth Schneider, “The Dialectic of Rights and Politics: (1986), 61 New York U.L.Rev. 589; MacKinnon, “Discourse”, at 72.

368. By attempting to highlight embeddedness of violence of law and the potential connections with patriarchy, I am here attempting to continue the feminist project of consciousness-raising, to illuminate the structures of domination as they exist both externally and internally, consciously and unconsciously. See further MacKinnon, “Agenda” *supra* note 146 at 519-520.

Again, in light of the feminist emphasis of contextualism, I think it is appropriate to remember who is speaking when we discuss legal remedies. We are lawyers. Despite our counterhegemonic aspirations, our radicalism and our feminism, we are also lawyers who conceive of the world through a legalistic grid and who incorporate that perspective in everything we do, even if, as MacKinnon says, “we are feminists first”. I fear that law and legal discourse are magnetic and imperialistic, colonizing our creative imaginations and constraining

Nor can these dilemmas be resolved by attempting to distinguish between means and ends,³⁶⁹ because, as history demonstrates, once one begins to adopt a certain methodology that has an ineluctable impact on the consequences. Means and ends, methods and outcomes, processes and goals coexist in a symbiotic relationship. As Cheryl Cohen comments in the context of “sexuality”,

I think a political movement that uses any means to its end is doomed to achieve an undesirable end. A feminist political praxis that uses any means to tear down patriarchy may find that the practices it advocates ultimately construct the personalities of the next generations. If feminists advocate sexual practices which, when removed from a context of caring, can become objectifying and dehumanizing, they may thereby be responsible for an experimentalism with desire that sets not limits and gives no guidelines for constructive and healthy relations between persons. They may succeed in escaping from patriarchal constructions of sexuality, but they may also thereby destroy the human caring and responsibility that give us hope for a better world. I think ethics is essential to all politics but particularly in the traumatic transition to an unknown future.³⁷⁰

We can concretize and contextualize these reflections through a brief review of some of the legal strategies suggested by feminists to deal with pornography. Proposals grounded in the criminal law sanction are the most obviously problematic in so far as there is a clear invocation of the repressive and punitive powers of the state, in support of feminist's preferred agenda. The feminist challenge only goes so far as to change the object of state imposed violence, not the nature of law itself. As such, it reflects the concerns of the “demand for access approach”, the “second wave” of feminist jurisprudence.

Do the civil law remedies, those which are tortious or human rights based, avoid this same problem? Do they attempt something that is more transgressive or transformative? An analysis of the anti-pornography ordinances may prove to be particularly useful at this point.

our emancipatory potentials by the shackles of seeking solutions to politico-social problems through law. I am frightened by the thought that the pervasiveness of legal ideology may be so deeply engrained that nothing seems possible without the invocation of its sanctifying blessing through violence. Equalitarianism, if prioritized, may result in “an equality of dehumanization”. (Herbert Marcuse, *Counter-Revolution and Revolt* 75 (1972)).

Similar concerns about the tension-ridden relationship between feminism and legalism, particularly as “legalist loyalties” may tend to trump the feminist methodology of consciousness-raising, have been voiced by Robin West, “Hedonic Lives”, *supra* note 164 at 44-45.

369. For a critique of means and ends thinking as malist alienating dichotomies, see A. Miles, “I.F.P.”, *supra* note 21 at 482, “IF”, *ibid.* at 59-60.

370. “The Feminist Sexuality Debate: Ethics and Politics” (1986), 2 *Hypatia* 71, 84-85; see also, Grimshaw, *supra* note 44 at 214-221; Steinham, “Feminist Ethic”, *ibid.* at 62.

Andrea Dworkin and Catharine MacKinnon, encouraged by the admittedly limited successes of judicial response to actions based upon sexual harassment, have developed the anti-pornography ordinance that would allow women to pursue civil remedies against the pornocrats. In so far as such an approach does not invoke the criminal law remedy it does not call on the coercive power of the state. Indeed, MacKinnon sees this argument as being the main reason why the ordinance is neither prior-restraint nor censorship. She is at pains to point out that the ordinance is different from obscenity legislation.³⁷¹ Moreover, the ordinances attempt to rework the evaluative criteria of law in so far as they attempt to materialize in legal terms the harmful significance which women attach to pornography. Viewed in this light, such proposals encompass some of the concerns of the "third wave" of feminist jurisprudence.

However, despite the important step forward that such ordinances achieve, they still fail to come to terms with the concern of what might be called the "fourth wave" of feminist jurisprudence, the inquiry into the way in which legal norms are operationalized. MacKinnon has, on many occasions, reiterated the claim that the ordinances do not invoke the power of the state, rather they empower women. However, such a dichotomous view is difficult to maintain, and cannot be justified on the basis of the formalistic distinction between civil and criminal law. The ordinances were lobbied for and achieved or defeated through statist fora, municipal governments and/or courts. Although the plaintiff in cases is intended to be a private person, the channels through which the action must go — human rights commissions, courts — are statist institutions.³⁷² The process of empowering women, therefore, does not take place in the absence of the state, but rather through the state.

This attempt to highlight the continued influence of the state should not be interpreted as being libertarian or anti-statist, for the state must be central in any project of transformation. Rather, it is simply a reminder

371. See e.g. *Feminist Unmodified* at 140.

372. More recently MacKinnon has withdrawn from her earlier view that the ordinances do not empower the state to admit, "It does not empower the state in the direct way that an obscenity law does" "Discourse", at 34. The key word here, of course, is "direct", and again, later, she posits that "we have the audacity to think that we might be able to use the state to help (empower women)". *Ibid.* at 72. Thus MacKinnon's concerns about the state are very different than my own. Her main concern is emphasizing the non-statist nature of the legislation is to distinguish the ordinance so as not to be open to accusations of prior restraint, censorship or the danger of the legislation backfiring. She does not deal with the concern of the violence of law. On the contrary, on one occasion she suggests that it may be "worth considering" the use of the United States federal criminal law power, in appropriate circumstances. "Speech", *supra* note 301 at 61, footnote 44.

that so pervasive and multifaceted is the structure of the state in post-industrial, patriarchal society that is difficult to evade its influence. My main point is narrower, however. The reason why civil law remedies — specific performance or damages — are attractive in the first place is because they might just be enforced against the producers or consumers of pornography. But the enforcement of civil remedies is completely dependent upon the coercive apparatus of state, in the same way as the criminal law power. Consequently, the ordinances, although innovative and creative, are also overdetermined by the threat and potential actualization of violence and, in their own way, although perhaps at a later stage, reinforce women's dependency on the normalization of violence. The cycle is difficult to break.

None of this is to say that feminism is internally debarred from recourse to law in all circumstances. I am not so utopian or naive as to believe that by avoiding or ignoring law it will simply wither away, or that recourse to law is not a necessary step in any political movement. I am neither advocating an abandonment of law nor "counselling abdication of the state altogether".³⁷³ Nor am I saying that women should not use violence to defend themselves against male violence.³⁷⁴ Rather, I am suggesting that feminists be very wary of the seeming potential of law for it is also quicksand that could silently but effectively bury the emancipatory impulse that motivates so much of feminism. Rephrased, if the ethic of care is a constitutive element of contemporary feminism, its "injunction not to hurt others" would suggest that there is a *prima facie* presumption against legal remedies, while the burden of proof is on those who support legal remedies to demonstrate that the returns are worth the risk.³⁷⁵

373. A stance which MacKinnon ascribes to Marxism in "Feminist Jurisprudence", *supra* note 209 at 643.

374. MacKinnon once asked, "Don't they want us to learn how to kill?" in "Women Who Kill" (1983), 34 Stanford L.Rev. at 732.

Although I am no pacifist, I would certainly prefer if people did not know how to kill. Having said that, and to be more gender specific, I think that there clearly are circumstances in which it may be appropriate for women to do violence to men, and even kill them. The obvious example is women who are subject to seriously abusive relationships. And I think that it is appropriate for feminists to defend these women from the prosecutorial violence of the state. My objection is to the uncritical reinforcement of the violence of modern law. Direct action by women is less of a problem for me because, like abortions, such actions are hardly taken lightly, and is unlike the violence of the law which, as Cover has pointed out, is structured so as to minimize our resistance to violence.

375. By risk I mean several different things. First there is risk articulated in this paper, the risk of foregoing an important aspect of the feminist vision. Second there is the political risk that such legislation will backfire, hurting the women's movement rather than helping it. Third, there is the risk that strategies of legal regulation may be unduly divisive of the women's movement at the expense of a strategy the precedents for which are hardly encouraging.

I am not saying that feminists should not pursue legal remedies to the problem of pornography. That would be to say too much, it would be too judgemental, too authoritarian, too despotic. I do not "know" what feminists know; pornography does not, cannot, impact my life the way it does women's lives. But it seems to me that the question posed by pornography and the appropriate feminist response creates a moment of "crisis and transition"³⁷⁶ for feminist theory and praxis. In their attempts to effectively deal with the pornographic assault, feminists may take the opportunity to respond in ways that are innovative and transgressive, motivated by an awareness of interconnectedness and inspired by an ethic of care that continues to "apprehend the reality of the other".³⁷⁷ Or, feminists may take recourse to "the cycle of repetition that has extended across generations a cold loneliness"³⁷⁸ concretized in the impersonalized corpus of a determinatively repressive law. That choice is one that must be made by women and feminists, as a community, not by another.

V) Conclusion

To be without a conclusion or destination, is not, however, to be without purpose.

Elizabeth Meese³⁷⁹

It has been widely recognized that, even taken in their best light, women's progress through law has been a "mixed bag" and even reactionary. MacKinnon herself is acutely conscious of the paucity of success in achieving equality through legal remedies.

The abortion right, framed as a right to privacy rather than a right to sex equality, was recognized, only to be taken almost immediately from women who have least access to it . . . women are poor and their pay is at least as far from being sex-equal as it was before the passage of legislation guaranteeing pay equality by law. Women are more and more losing custody of their children, in part because of legal reforms feminists helped put in place. The rape rate is increasing significantly, while the conviction rate for rape is not, in spite of legal changes feminists fought for and won over the last decade. . . .

Feminism Unmodified at 1 (footnotes omitted).

376. Gilligan, *Voice*, ch. 4.

377. I would attach one important proviso to my concerns. As should be clear my primary concern is law's disregard of our common humanity as persons. If law is used against non-humans, "legal persons" as we rather euphemistically call "corporations", then many of my concerns are less important. Corporations are not sentient, and within my value structure are less important than people. But again, that should not be interpreted *carte blanche*, a formalistic approach cannot be adopted. Many corporate bodies are simply real persons acknowledged to have a particular legal status. Others are large empires distinct from the people who stand behind them. I am more comfortable if the contextual approach is adopted, to distinguish between those who could be subject to the violence of law, and those who should not.

378. *Voice*, at 107.

379. *Crossing the Double-Cross: The Practice of Feminist Criticism* (1987) at xii.

Imagination: . . . “not merely for changing institutions but for human relationships; not merely for equal rights, but for a new kind of being”

Adrienne Rich³⁸⁰

I have covered a great deal of ground in this essay. Through a discussion of subjugated knowledges, in the spirit of a jurisprudential archeological dig, and motivated by the feminist preference for transdisciplinary research and reflection, I have attempted to unearth at least one of the foundations of our received jurisprudential tradition. The exposition of law's antifactual nature, in turn, opened up an interrogative space in which to investigate some hitherto unquestioned assumptions that provide the mortar for the edifice. Through an extensive discussion of some of the tensions of contemporary feminism, I suggested the possibility of an alternative juridical construct, one that transcends and displaces the thanatical impulse that has underpinned patriarchal society and plagued the dominant jurisprudential tradition. But I do not offer a tidy conclusion, for the invocation of closure usually obscures and excludes more than it enlightens or resolves.³⁸¹ Moreover, the centrality which feminism and modernism afford to openness sits uncomfortably with the traditional legal quest for right answers.

However, in order to be as clear as possible, it may be useful if I attempt to forestall some possible misinterpretations. For many women, and perhaps some men, this paper may be problematic, accommodating, deradicalizing, condescending, arrogant, offensive, or perhaps even insulting. Some may understand it as setting up feminism as either glorificationally redemptive or vindictively retributive, a jurisprudential twist to the madonna/whore stereotype, or the double-standard, yet again. Others may interpret my support of the ethic of care as an attempt to modernize the “cult of pure womanhood”³⁸² or as hopelessly sentimentalized, romantic or naive. Some may interpret it as the product of the “abstract refuges of academia”, turning “women into a field or an idea or a subspeciality, an artifact of one theoretical approach or another”.³⁸³ It may well be construed as a “magical approach to social change . . . (a) ‘let's pretend’ strategy (that) is idealist and elitist both”.³⁸⁴ Others, less benignly, may see it as the blame-the-victim strategy, thinly

380. In “Toward a Woman Centred University” *Lies Secrets and Silence* (1979) at 125 at 155.

381. Barbara Johnston, *The Critical Difference* (1981).

382. Barbara Berg, *The Remembered Gate* (1979).

383. *Feminism Unmodified* at 216.

384. *Feminism Unmodified* at 219.

disguised.³⁸⁵ At the bottom such responses are probably based in a belief that the article and myself manifest “virtually no commitment to change”³⁸⁶ caught up in a “conception of politics as fantasy and entertainment”.³⁸⁷ Others may characterize my reflections as either oblivious to, or trivializing of, the oppression of women, an effort to deny them recourse to one of the few remedies they may have available to challenge patriarchy.

I want to resist such criticisms. The purpose of this paper is not negation, rather it is an attempt to contribute to the feminist demand for constant conversation³⁸⁸ from the perspective of what might be called a “feminist-positive”³⁸⁹ male. As the celtic triptych in Part A might suggest, my commitment to change is fundamental, and it is that which leads me to ask the questions I have asked, posit the dilemmas I have posed, and suggest the suggestions I have made.³⁹⁰ Emphatically, to problematize is not to stymie. Rather, it is to continue the feminist critical dynamic, to locate and challenge patriarchy and domination in all their forms and to raise the possibility of their transcendence. This is not masculinist ventriloquism. I am not speaking for women. I am attempting to speak with women about opportunities, aspirations and visions which some have claimed to be a central component of their agenda. My question asks whether the legal tools, unless radically refurbished, can deconstruct the master’s house?³⁹¹ I suggest that law can be a vital terrain in the process of emancipating women, but only if remade in a fundamentally different way. Like a magnet in a force field I am drawn towards the practical suggestions that MacKinnon and other feminists have made in an effort to access the tools of law; yet, simultaneously, law appears to stay the same, except that the constituency has changed.³⁹² Such a

385. Another variation may be, “why experiment on the most vulnerable?” See Minow, “Part of the Solution, Part of the Problem” Review, J. Handler, *The Conditions of Discretion* (1986), 34 U.C.L.A. Law Rev. 981, 1000.

386. *Feminism Unmodified* at 216.

387. *Feminism Unmodified* at 221.

388. Editorial (1987), 12 Signs 619, 620.

389. Sean Mullarkey, “Can a Man Be a Feminist” (Paper for “Legal Status Based on Sex”, Dalhousie University) (Spring 1988).

390. Without slipping into the danger of believing that thinking is doing, Karl Barth posits that, “transformation of thought is the key to the problem of ethics, for it is the place where the turning about takes place by which [we] are directed to new behaviour”. *The Epistle to the Romans* 438 (1933).

391. Andre Lorde, “The Master’s Tools” *supra* note 206.

392. As Robin West says in a different context,

We must begin to make good on our promise to change the discourse with our presence, instead of simply changing ourselves to fit the discourse.
“Hedonic Lives” *supra* note 164 at 10.

viewpoint, I think, comes dangerously close to seeing the law as neutral and capturable, if only the right strategies could be developed. It reminds me of legal realism's aspirations for social engineering through law. As such, it ignores the traditions, values, and elements imbricated within the very structure of contemporary law, a central value being violence.³⁹³ The critique and renovation envisioned by such a practice are partial rather than transformative, perhaps even more of the same. Traditional power not only corrupts, it deradicalizes alternative power structures. Feminism does provide a unique opportunity for the actual reconstitution of law, not just its reworking. Speculation, imagination and hope, on their own, cannot make things otherwise, but without them it is difficult to know where to go.

My fear is that it may be possible to detect a pincer movement confronting feminism. If it is true that pornography's proliferation and increasing violence is due, in part, to a reaction against feminism,³⁹⁴ then feminism's attempt to take refuge in and seek remedies through the law may be reinforcing the *modus operandi* of patriarchal society rather than

393. On occasion, MacKinnon does explicitly articulate concerns about the nature of law, but once again her comments are underdeveloped, and do not fit with the more instrumentalist approach which characterizes most of *Feminism Unmodified*. For example,

The law — like the hunt, warfare and religion — has been a male sphere. The qualities and values of these pursuits have defined the male role and public life. They have defined what power means. [*Feminism Unmodified* at 26.]

She continues,

The feminist question for the future of women's rights is: if we acquire and use these forms of power, including economics (the modern equivalent of the hunt), the use of physical force (of which war is a form), and the tools of law (the secular religion) will we use them differently. [*Feminism Unmodified* at 26.]

This comment is important, I think. MacKinnon draws the analogy between religion and law rather than force and law. This suggests that MacKinnon understands law more in the context of its educative, ideological manifestations, rather than its coercive elements. This interpretation that MacKinnon primarily understands law as ideological is reinforced later when she discusses the educative effect of law in relation to pornography. [*Feminism Unmodified* at 131, 223.]

This view is problematic. It is insufficiently cognizant of the coercive role of law, with its built-in hierarchy, domination and subordination. It ignores the possibility that although the ideological function of law may be dominant, its coercive function is determinative. Law certainly does educate, but it is an education reinforced by violence, or the threat of violence, an education based on fear, terror. Remember Plato. In turning to the law to fight hierarchy, there is a very real danger of simply replacing one hierarchical relationship with another, adding momentum to an already eschatological spiral.

Only once in her most recent work does she recognize the fundamentally coercive nature of the law, when she opines, "law being a form of combat". [*Feminism Unmodified* at 75.]

394. See for example, Dworkin, "Why So-Called Radical Men Love and Need Pornography" in Lederer, "Night" *supra* note 307, 148 at 153; Sally Wagner, "Pornography and the Sexual Revolution: The Backlash of Sadoomasochism", *Against Sadoomasochism: A Radical Feminist Analysis* 23 Linden, ed., (1982).

challenging it. Pathological pornography terrifies women, thereby limiting the feminist agenda to a politics of fear, rather than a politics of hope. Patriarchal society will only allow feminism a very limited defence mechanism, one which is circumscribed by a masculinist ideology. Thus between them, pornography and law, aggressor and defender, they encircle the radical transgressive potential of feminism, terrorize it and disempower it. By offering it as a potentially helpful defence mechanism, law — as it is currently constituted — may lead feminism to forgo too quickly its transformative, jurisgenerative potential, adopting a policy of resistance at the price of partial incorporation.